88-1697

Supreme Court, U.S.
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No.____

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

HAJOCA CORPORATION

Petitioner,

v.

WARREN G. HEROLD

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether a plaintiff who alleges intentional age discrimination can survive a motion for directed verdict merely by questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate?

PARTIES

The parties to the proceedings in the court below were: Warren G. Herold and Hajoca Corporation.*

*Hajoca Corporation is a privately-owned corporation. Hajoca Corporation has no interests in, nor has as subsidiaries, nor is an affiliate of any business entities.

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WARREN G. HEROLD

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

Petitioner, Hajoca Corporation, respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit entered in this proceeding on December 22, 1988.

OPINIONS BELOW

The December 22, 1988 opinion of the Court of Appeals is reported at 864 F.2d 317 and appears in the Appendix at A-2 to A-15. The February 18, 1988 opinion of the United States District Court for the Western District of Virginia is reported at 682 F.Supp. 297, and is reproduced in the Appendix at A-16 to A-24 . The Court of Appeals Order, dated January 19, 1989, denying

Petitioner's Petition for Rehearing is unreported and is reproduced in the Appendix at A-1.

JURISDICTIONAL STATEMENT

The Court of Appeals denied Petitioner's petition for rehearing on January 19, 1989. Jurisdiction of this Court is proper under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

Section 4(a)(1) of the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621 *et seq.* ("ADEA" or the "Act"), provides in pertinent part:

> It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge an individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age. . . .

29 U.S.C. § 623(a)(1).

STATEMENT OF THE CASE

Hajoca Corporation is a Maine corporation which is engaged in the distribution of plumbing and heating supplies. It has numerous locations throughout the country.

Respondent, Warren G. Herold had been employed by Defendant, Hajoca's Staunton, Virginia profit center continuously from 1955. (Joint App. at 33).[1] He was employed as a truck driver from 1955 until 1962 when he assumed the duties of an order picker. (Joint App. at 34). In 1965 he assumed the duties of a shipping clerk in

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1. Petitioner is referring to the Joint Appendix submitted by the parties to the Fourth Circuit since neither the district court nor the Fourth Circuit referred to these facts in their opinions.

Hajoca's Staunton warehouse. (Joint App. at 34). Beginning in 1980, Hajoca's Mid-Atlantic Region in general, and the Staunton profit center in particular, experienced a significant downturn in their volume of business. (Joint App. at 83-84). Vernon Garber, the Staunton Profit Center Manager, when directed to reduce operating expenses, began laying off people. *(Id.)* When business continued to worsen in 1981 and 1982, Garber laid off additional people. *(Id.)* On March 12, 1982, Herold was laid off. (Joint App. at 34).

On October 14, 1983, Herold filed a complaint in the United States District Court for the Western District of Virginia, alleging that Hajoca violated the Age Discrimination in Employment Act, 29 U.S.C. §§ 621-634 (1986) when it laid him off. The case was tried to a jury on January 6 and 7, 1987.[2]

Herold testified that at the time of his layoff he was 56 years of age, that he had considerably more seniority than the younger employees were retained, that he was qualified to do the work remaining at Staunton and performed by younger employees, and that all of the jobs were interchangeable. Herold also testified that there had been a meeting in 1975 in which Mr. Garber announced a purported "seniority policy." App. at 7. Herold also presented evidence that an older part-time truck driver was discharged after him and that two younger, full-time, truck drivers were retained.

Mr. Garber testified that he selected the employees to be laid off based upon his determination of whether employees were performing tasks no longer needed at the Staunton facility or whether tasks could be combined with someone else's job. App. at 6-7. Also, Mr.

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2. On July 18, 1985, Hajoca filed a motion for summary judgment, alleging that either Herold could not establish a *prima facie* case, or that, assuming that a *prima facie* case could be established, that Herold could not show that age was the determinative factor in his termination. On December 6, 1985, the district court denied Hajoca's summary judgment motion.

Garber evaluated the employees' relative abilities and recent on-the-job experience. It was Mr. Garber's policy at Staunton not to transfer employees from one department or job classification to another. *Id.* Furthermore, in making the decision to lay off one employee or another, Mr. Garber did not consider the overall length of service with Hajoca as important as recent on-the-job experience. Finally, Mr. Garber testified that it was his philosophy to keep employees whom he felt were the best people when deciding whom to discharge. (Joint App. at 83).

Hajoca's motions for a directed verdict at the close of Herold's case and at the close of Hajoca's case were denied. The jury returned a verdict in favor of Herold and against Hajoca in the amount of $40,642.66 and an equal amount as liquidated damages because the jury found that Hajoca willfully violated the ADEA. App. at 16.

On February 18, 1988, the district court entered an order granting Hajoca's motion for judgment notwithstanding the verdict as to the verdict for liquidated damages, denying Hajoca's motion as to the verdict for compensatory damages, awarding Herold additional pension benefits, awarding Herold $1,042.42 as costs, and awarding plaintiff's counsel $47,382.25 in attorneys' fees. App. at 24 . Hajoca and Herold appealed.

The Fourth Circuit affirmed. First, the Fourth Circuit expressed reluctance to grant motions for directed verdict and JNOV where motive and causation are at issue. App. at 4. Claiming to follow the Fourth Circuit's interpretation of this Court's decisions in *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981) and *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), the court articulated the three-stage scheme of proof as follows:

> First, the plaintiff must establish a *prima facie* case of age discrimination. If he succeeds, the burden of

> production shifts to the defendant to articulate a non-discriminatory reason for treating plaintiff as he did. Once the defendant does that, the plaintiff must bear the burden of proving that he was the victim of intentional discrimination. He can do this by demonstrating that the defendant's proffered reason was a mere pretext and that, as between the plaintiff's age and the defendant's explanation, age was the more likely reason for the dismissal. *Western Electric,* 713 F.2d at 1014; *Lovelace v. Sherwin-Williams Co.,* 681 F.2d 230, 240-41 (4th Cir. 1982). App. at 5.

The Fourth Circuit then stated the proof required to establish a *prima facie* case as follows:

> In a reduction-in-force case, such as we have here, a plaintiff must show four things to make out a *prima facie* case under ADEA: (1) that he is in the protected age group, (2) that he was discharged, (3) that at the time of his discharge, he was performing his job at a level that met his employer's legitimate expectations, and (4) that persons outside the protected age class were retained in the same position or that there was some other evidence that the employer did not treat age neutrally in deciding to dismiss the plaintiff. *Western Electric,* 713 F.2d at 1014-15. App. at 5.

Recognizing that Herold had established the first three elements of his *prima facie* case, App. at 6, the Fourth Circuit conceded that Herold did not prove that persons outside the protected group were retained in his position. *Id.* However, the Fourth Circuit stated that a *prima facie* case could be established by "some other evidence indicating that the employer did not treat age neutrally." *Id.* In other words, according to the Fourth Circuit, "the plaintiff can satisfy the standard by showing that his employer treated an older worker differently than younger employees in similar positions." *Id.* The

court concluded that Herold had established evidence that he was dismissed while younger employees in "similar positions" were retained and that, therefore, he had established a *prima facie* case. *Id.* Conceding that Hajoca had articulated at least four nondiscriminatory reasons for dismissing Herold,[3] *Id.*, the Fourth Circuit recognized that "Herold then bore the burden of proving that Hajoca's proffered reasons were pretexts." App. at 7. The Fourth Circuit cited the following evidence for its conclusion that "the jury could properly have found that Hajoca's proffered reasons for dismissing Herold were mere pretexts and that it was more likely that age was the real reason for his firing." *Id*:

> Herold produced evidence that all the jobs in the Staunton, Virginia, branch were virtually interchangeable. He testified that the company policy, if followed, would have allowed him to "bump" workers with less seniority, even if they were in other job classifications. Herold presented evidence that he could perform all jobs but one and could have performed that one if he had received nominal training. He presented evidence from his supervisor and co-workers that his job performance had been good. Herold also presented evidence that when faced with cutbacks, the employer laid off an older truck driver while retaining two younger ones in the same job category. *Id.* (footnote omitted).[4]

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3. Hajoca contends that it articulated an additional reason for dismissing Herold left unchallenged by any evidence. Mr. Garber testified that it was his philosophy to keep employees whom he felt were the best people when deciding whom to discharge. (Joint App. at 83).

4. The Fourth Circuit misstates the record. Herold simply did not present any evidence, either by his testimony or otherwise, that "the company policy, if followed, would have allowed him to 'bump' workers with less seniority, even if they were in other job classifications." App. at 7. The *only* testimony with respect to "bumping"

The Fourth Circuit stated that the evidence "presented two versions of what happened and resolution of the case depended on which witnesses were credible." App. at 7-8. In response to Hajoca's contention that Fourth Circuit precedent compelled judgment in its favor notwithstanding the verdict because Herold had not challenged any of its articulated reasons, the court, recognizing the validity of the precedent, stated that "Herold presented evidence directly challenging *all of the reasons offered by Hajoca* to explain its decision to dismiss him." App. at 8. (Emphasis added).

The court, in concluding that the trial court properly denied the motions for directed verdict and judgment notwithstanding the verdict, stated:

> In sum, the evidence, when viewed in the light most favorable to the plaintiff, would allow the jury to find that the employer treated Herold differently than younger workers and that Herold's age, rather than the reasons proffered by Hajoca, more likely accounted for the dismissal of Herold.
>
> App. at 8-9.[5]

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW CONFLICTS WITH PRINCIPLES ESTABLISHED BY THIS COURT

This case presents a fundamental issue of Federal employment discrimination law: whether a plaintiff who alleges intentional discrimination can survive a motion

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is that of Mr. Garber who stated he did not permit it. *Id.* Furthermore, the court misstates the record with respect to the discharged truck driver. Only the two retained truck drivers were full-time drivers. The discharged driver was a part-time driver. (Joint App. at 71-72).

5. On March 29, 1989, the Fourth Circuit awarded Herold an additional $5,816.75 in attorneys' fees and costs.

for summary judgment, directed verdict, or judgment notwithstanding the verdict merely by questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate. The Fourth Circuit held that he can. That decision conflicts with four principles established by this Court. First, as this Court held in *Texas Department of Community Affairs v. Burdine,* 450 U.S. 248 (1981), the ultimate burden of persuasion in a discrimination case "remains at all times with the plaintiff" who must "prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not the true reasons, but were a pretext for discrimination," *Id.* at 253. Second, the ADEA "was not intended to 'diminish traditional management prerogatives,' " *Id.* at 259 (quoting *United Steel Workers of America v. Weber,* 443 U.S. 193, 267 (1979)). Third, a court may not permit a case to go to a jury unless the plaintiff presents evidence " 'upon which a jury could *properly* proceed to find a verdict for the party producing it,' " *Anderson v. Liberty Lobby, Inc.,* 477 U.S. 242, 251 (1986) (quoting *Improvement Co. v. Munson,* 14 Wall 442, 448, 20 L.Ed 867 (1872), emphasis added). Finally, a court may not permit a case to go to a jury, even when the defendant's state of mind is at issue, when the plaintiff fails to offer "affirmative evidence" in support of his complaint. *Liberty Lobby,* 477 U.S. at 256.

A. The Decision Below Misapplies this Court's Allocation of Evidentiary Burdens in Employment Discrimination Cases and Standards for Directed Verdict

In *McDonnell Douglas Corp. v. Green,* 411 U.S. 792 (1973), this Court established the allocation of proof scheme central to employment discrimination cases. First, "the plaintiff has the burden of proving by a preponderance of the evidence a prima facie case of

discrimination." *Burdine,* 450 U.S. at 252-53. The defendant then has the burden of *articulating* "some legitimate non-discriminatory reason" for the action. *Id.* at 253. If defendant meets this burden of production, "the presumption raised by the prima facie case is rebutted," or drops from the case. *Id.* at 255 (footnote omitted). Then, "the plaintiff must have the opportunity to prove by a preponderance of the evidence that the legitimate reasons offered by the defendant were not its true reasons, but were a pretext for discrimination." *Id.* (citations omitted). A plaintiff "may succeed in this [proof of intentional discrimination] either directly by persuading the Court that a discriminatory reason more likely motivated the employer or indirectly by showing that the employer's proffered explanation is unworthy of credence." *Id.* at 256 (citation omitted).

The requirement that the plaintiff either prove that age more likely motivated the employer's decision or that the articulated legitimate reason is pretext for age discrimination stems from the concern of Congress, acknowledged repeatedly by this Court, that employment discrimination laws not impede "traditional management prerogatives". *Burdine,* 450 U.S. at 259; *United Steelworkers of America v. Weber,* 443 U.S. 193, 207 (1979); *see also Local No. 93, International Association of Firefighters v. City of Cleveland,* 478 U.S. 501, 520 (1986).

The types of evidence which this Court has considered relevant evidence of pretext for discrimination do not impede management decisions. For example, this Court in *McDonnell Douglas* cites "facts as to the petitioner's prior treatment of respondent during his prior term of employment; petitioner's reaction, if any, to respondent's legitimate civil rights activities; and petitioner's general policy and practice with respect to minority employment [as shown by statistics]". 411 U.S. at 804-5 (footnote omitted). And this Court in *U.S. Postal Service Board of Governors v. Aikens,* 460 U.S.

711 (1983) pointed to the types of evidence which it felt exhibited discriminatory intent: a history of the employer favoring whites over blacks for promotions; derogatory comments about blacks by the employer, and the plaintiff's relatively better education, performance history, and training relative to the white persons promoted over him. 460 U.S. at 711, n.2.

Recognizing the similarities between the standards for evaluating motions for summary judgment and motions for directed verdict, this Court in *Liberty Lobby* stated that evidence must be viewed "through the prism of the substantive evidentiary burden." 477 U.S. at 254. In other words, if the party opposing the motion fails to prove some essential element of his case, e.g. intent to discriminate, a court should not permit a case to go to the jury. Merely attempting to discredit an employer's reasons for an employment decision is also insufficient under *Liberty Lobby* because as this Court stated " 'discredited testimony is not considered a sufficient basis for drawing a contrary conclusion.' " 477 U.S. at 256 (quoting *Bose Corp. v. Consumers Union of United States, Inc.,* 466 U.S. 485, 512 (1984)).

Reading *McDonnell Douglas, Burdine, Aikens,* and *Liberty Lobby* together, an ADEA plaintiff, once the presumption that age discrimination occurred drops from the case because his employer articulates legitimate business reasons for the decision, must produce competent evidence that the employer's reasons are a cover-up for discrimination. *McDonnell Douglas,* 411 U.S. at 805. This evidence must relate either directly or indirectly to the alleged discriminatory animus of his employer, not merely discredit his business judgment.[6]

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6. Hajoca recognizes that a plaintiff need not necessarily present rebuttal evidence at the close of the employer's case, but may rely on "his initial evidence, combined with cross-examination of the defendant." *Burdine,* 450 U.S. at 255, n.10. Herold presented no rebuttal evidence, relying on his initial evidence and cross-examination of Hajoca's witness. However, none of Herold's evidence treated the reasons articulated by Hajoca for his dismissal.

The decision below does not require any evidence of an intent to discriminate. Contrary to this Court's holding in *Liberty Lobby,* 477 U.S. at 256, that cases involving motivation can and should be withheld from juries, the Fourth Circuit has expressed reluctance to do so, App. at 4, claiming that the credibility of witnesses — without impeachment or refutation — is involved in ADEA cases.

The decision of the Fourth Circuit permits a plaintiff to have his case go to a jury simply by questioning his employer's business judgment, although all of the facts underlying that judgment are not questioned,[7] although the legally mandatory inference of unlawful discrimination "drop[ped] from the case," *Burdine,* 450 U.S. at 255 n.10, and although he has produced no evidence, direct or indirect, that the employer's judgment was really motivated by intentional discrimination. The decision shifts the burden of persuasion from the plaintiff to the employer. In the Fourth Circuit, a plaintiff may prevail simply by disagreeing with the employer's decision, without ever introducing evidence of the type required by this Court's decisions in *McDonnell Douglas,* and *Aikens,* evidence which links the employer's decision with an intent to discriminate. Clearly, this result was not intended by ADEA or the interpretation of other employment discrimination legislation by this Court.

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7. Hajoca articulated five reasons supporting the selection of Herold for discharge: 1) Mr. Garber decided which jobs were no longer needed or which could be combined; 2) Mr. Garber compared the employees' relative abilities and recent on-the-job experience; 3) Mr. Garber did not transfer employees from one job classification to another; 4) Mr. Garber did not consider overall length of service as important as recent on-the-job experience; and, 5) Mr. Garber chose to keep those employees he felt were the best employees. There is no evidence on the record which *even questions* whether these were the reasons why Mr. Garber chose Herold for discharge. The Fourth Circuit would allow a jury to consider evidence that at most shows that the plaintiff disagrees with the employer's decision.

It is well settled that the ADEA was "not intended as a vehicle for judicial review of business decisions." *Kephart v. Institute of Gas Technology,* 630 F.2d 1217, 1223 (7th Cir. 1980), cert. denied, 450 U.S. 959 (1981); *see also Dale v. Chicago Tribune Co.,* 797 F.2d 458, 464 (7th Cir. 1986), *cert. denied,* 479 U.S. 1066 (1987) ("This Court does not sit as a super-personnel department that reexamines an entity's business decisions"); *Dea v. Look,* 810 F.2d 12, 15 (1st Cir. 1987) ("[plaintiff] cannot meet his burden of proving 'pretext' simply by refuting or questioning the defendant's articulated reason."); *Simpson v. Midland-Ross Corp.,* 823 F.2d 937, 941 (6th Cir. 1987) ("mere conclusory allegations do not suffice to prove intentional discrimination on age."). As the court in *Elliott v. Group Medical & Surgical Service,* 714 F.2d 556 (5th Cir.1983), *cert. denied,* 467 U.S. 1215 (1984) noted "[The ADEA is not] a device which permits the jury to examine an employer's reasons for discharge and determine that the employer's business judgment or policies do not appeal to its sensibilities." *Id.* at 567.

The decision below contravenes the holdings in *McDonnell Douglas, Burdine,* and *Aikens,* by allowing a plaintiff to obtain jury review of an employer's judgment, merely by disagreeing with the employer's decision, without offering any evidence that the decision was motivated by age discrimination. The decision below impermissibly trammels traditional management prerogatives. For these reasons, the Court should grant review.

II. THE DECISION BELOW CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS CONCERNING WHAT CONSTITUTES PROOF OF PRETEXT FOR DISCRIMINATION

The decision below exemplifies a conflict among the federal courts of appeals concerning whether mere

questioning of an employer's judgment without evidence of intent to discriminate constitutes a showing of "pretext for discrimination", permitting age discrimination claims to be heard by juries. Review is thus necessary to resolve this conflict.

Contrary to the decision of the court below, the First, Sixth, and Seventh Circuits have concluded that an ADEA plaintiff cannot have his case go to a jury merely by challenging the wisdom of the employer's decision without linking that decision to unlawful discrimination. In *Gray v. New England Tel. and Tel. Co.*, 792 F.2d 251 (1st Cir. 1986), for example, the First Circuit affirmed a directed verdict in favor of the employer at the close of all the evidence in an age discrimination case, where the plaintiff, in response to his employer's proffered reasons for his discharge, merely contested the factual underpinnings of those reasons. The court stated:

> It is not enough for the plaintiff to show that the employer made an unwise business decision, or an unnecessary personnel move. These facts, even if demonstrated, do not necessarily show that *age* was a motivating factor.
>
> *Id.* at 255.
> (Emphasis in original).

See also Dea v. Look, 810 F.2d 12, 15 (1st Cir. 1987) (plaintiff cannot meet burden of proving pretext "simply by refuting or questioning the defendants' articulated reason."); *White v. Vathally*, 732 F.2d 1037, 1043 (1st Cir.), *cert. denied*, 469 U.S. 933 (1984) ("[m]erely casting doubt on the employer's articulated reason does not suffice to meet the plaintiff's burden of demonstrating discriminatory intent.").

The Sixth and Seventh Circuits have reached similar conclusions. *See Askin v. Firestone Tire & Rubber Co.*, 600 F.Supp. 751, 753 (E.D. Ky. 1985), *aff'd. mem.*, 785 F.2d 307 (6th Cir. 1986) (mere showing that

business reasons are "unreasonable or a pretext for some arbitrary or oppressive motive" will not, in the absence of evidence that "the articulated reasons were a pretext for age discrimination," present issues to be considered by a jury); *Dale v. Chicago Tribune Co.*, 797 F.2d 458, 464-65 (7th Cir. 1986), *cert. denied*, 479 U.S. 1066 (1987) (to present an issue for the jury, a plaintiff "must do more than challenge the judgment of his superiors through his own self-interested assertions"; he "must establish a nexus between his evidence and age discrimination").

The court below requires no such nexus. Indeed, according to the Fourth Circuit, a plaintiff need not even prove the employer's reasons for the decision unworthy of credence as required by *Burdine*, but merely "challenge" (in reality "disagree with")[8] the reasons offered by the employer, App. at 8, without any evidence that the reasons proffered were a cover-up for a discriminatory decision as required by *McDonnell Douglas*.

Only this Court can effectively resolve what is an obvious source of confusion for the Fourth Circuit – what is proof of pretext sufficient to permit an age discrimination claim go to a jury – and a source of conflict among the circuits. The conflict provides sufficient grounds for reviewing the decision below.

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8. The only evidence Herold offered concerning the reasons given by Hajoca was that 1) in his view, all of the jobs at Staunton were interchangeable; 2) in his view, Herold could perform most of the jobs at Staunton; and 3) his job performance was good. Even if one accepts that this evidence "challenges" all five reasons given by Hajoca (Hajoca submits that it clearly does not) there is no perceptible relationship between this evidence and a cover-up for age discrimination.

CONCLUSION

For the reasons set forth above, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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Dated: April 19, 1989

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3955
No. 88-3967

WARREN G. HEROLD,
Plaintiff-Appellee,

v.

HAJOCA CORPORATION,
Defendant-Appellant.

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing and suggestion for rehearing in banc of Hajoca Corporation were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Chapman and Judge Williams, United States District Judge sitting by designation.

FOR THE COURT

/s/ JOHN M. GREACEN
CLERK

Dated: January 19, 1989

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3955
No. 88-3967

WARREN G. HEROLD,
Plaintiff-Appellee,

v.

HAJOCA CORPORATION,
Defendant-Appellant.

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

Argued Oct. 6, 1988.

Decided Dec. 22, 1988.

Rehearing and Rehearing In Banc Denied Jan. 19, 1989.

Before: MURNAGHAN and CHAPMAN, Circuit Judges, and WILLIAMS, United States District Judge for the Eastern District of Virginia, sitting by designation.

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OPINION OF THE COURT

MURNAGHAN, Circuit Judge

An Age Discrimination in Employment action[1] confronts us here. The plaintiff, Warren G. Herold, was in part successful. His compensatory award should prevail over defendant Hajoca Corporation's motions for summary judgment, directed verdict and judgment *non obstante veredicto,* because Herold was able to demonstrate a failure of Hajoca to follow an announced policy of laying off the shorter time employees among those qualified when lack of work result in termination. Herold showed there were several (perhaps four) younger employees retained when he was terminated who had less time in service than he did. However, as to the jury's award of a liquidated (punitive) damages amount equal to the compensatory award, the district judge correctly ordered entry of judgment *non obstante veredicto.* 682 F.Supp. 297.

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1. Under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, hereinafter "ADEA".

I.

In considering a motion for directed verdict or for a JNOV, the trial court is to apply the same standard: whether, viewing the evidence in the light most favorable to the nonmoving party and giving him the benefit of all reasonable inferences, there is sufficient evidence in the record to support a jury verdict in his favor.[2] *Taylor v. Home Ins. Co.*, 777 F.2d 849, 854 (4th Cir. 1985), *cert. denied*, 476 U.S. 1142, 106 S.Ct. 2249, 90 L.Ed.2d 695 (1986); *Wilhelm v. Blue Bell Inc.*, 773 F.2d 1429, 1433 (4th Cir. 1985), *cert. denied*, 475 U.S. 1016, 106 S.Ct. 199, 89 L.Ed.2d 313 (1986). The court must not weigh the evidence or assess the credibility of witnesses. *Taylor*, 777 F.2d at 854. In reviewing a grant or denial of a motion for a JNOV or directed verdict, the appellate court is to apply the same standard that governed the trial court's determination. *Lust v. Clark Equipment Co.*, 792 F.2d 436, 438 (4th Cir. 1986).

The Court has cautioned against granting motions for directed verdict and JNOV in discrimination cases where motive and causation are at issue:

> Determination of motive is ordinarily a function within the purview of the fact finder because so much depends on an assessment of the credibility of the witnesses. A finding of motive should not be set aside by the reviewing court unless the evidence clearly compels rejection.

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2. A decision on the compensatory aspect of the case against Hajoca on its JNOV and directed verdict motions eliminates the need for this Court to address the summary judgment argument. The standard for considering a motion for summary judgment "mirrors the standard for a directed verdict under Federal Rules of Civil Procedure 50(a)." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Taylor, 777 F.2d at 854 (trial court did not err in denying defendant's motion for directed verdict and JNOV in ADEA case).

In ADEA cases, the Fourth Circuit permits plaintiffs to use the three-stage scheme of proof originally formulated for Title VII cases.[3] *EEOC v. Western Electric Co.,* 713 F.2d 1011, 1014 (4th Cir. 1983). *See Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). First, the plaintiff must establish a *prima facie* case of age discrimination. If he succeeds, the burden of production shifts to the defendant to articulate a nondiscriminatory reason for treating plaintiff as he did. Once the defendant does that, the plaintiff must bear the burden of proving that he was the victim of intentional discrimination. He can do this by demonstrating that the defendant's proffered reason was a mere pretext and that, as between the plaintiff's age and the defendant's explanation, age was the more likely reason for the dismissal. *Western Electric,* 713 F.2d at 1014; *Lovelace v. Sherwin-Williams Co.,* 681 F.2d 230, 240-41 (4th Cir. 1982).

[1] In a reduction-in-force case, such as we have here, a plaintiff must show four things to make out a *prima facie* case under ADEA: (1) that he is in the protected age group, (2) that he was discharged, (3) that at the time of the discharge, he was performing his job at a level that met his employer's legitimate expectations, and (4) that persons outside the protected age class were retained in the same position or that there was some other evidence that the employer did not treat age neutrally in deciding to dismiss the plaintiff. *Western Electric,* 713 F.2d at 1014-15. An individual must be at least 40 years of age to fall within the protections of ADEA. 29 U.S.C. § 631(a). Herold was.

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3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

[2] Concededly Herold established the first three elements of his *prima facie* case. Hajoca argues, however, that the fourth requirement remained unsatisfied because no younger workers were retained in the same job (*i.e.,* shipping clerk) that Herold held. It is true that the remaining younger workers not discharged when Herold was did not hold jobs with the same title as that assigned to Herold's job and that, on his discharge, his job duties were assigned to a worker older than Herold. But that does not mean that Herold failed to satisfy the fourth element of his *prima facie* case. *Western Electric* provides that a plaintiff can satisfy that element either by showing that persons outside the protected class were retained in the same position or by producing some other evidence indicating that the employer did not treat age neutrally. *Western Electric,* 713 F.2d at 1014-15. Thus, the plaintiff can satisfy the standard by showing that his employer treated an older worker differently than younger employees in similar positions.

[3] The evidence, when viewed in the light most favorable to Herold, would support a jury finding that his employer treated him differently than a number of younger workers who were in similar positions and that Herold thus had made out a *prima facie* case of age discrimination. He presented evidence that he was dismissed while younger workers, at least one of whom was under 40 and therefore outside the ADEA-protected class, were retained. He presented evidence that he was qualified to perform the jobs of those younger workers, including the one under 40. In addition, he presented evidence that the company had a long-standing policy of laying off the workers with the least seniority first whenever faced with an economic downturn, but that the defendant had failed to follow that procedure in the instant case.

Hajoca responded by articulating four facially nondiscriminatory reasons for dismissing Herold instead of the younger employees. First it was contended that

Herold's job was the easiest to eliminate. Second, Hajoca contended that company policy did not permit an employee to displace or "bump" a worker with less seniority if the two employees were in different job classifications. Third, Hajoca argued that Herold was less versatile in performing other jobs. Finally, it was argued that Herold was not as good a worker as the others.

Herold then bore the burden of proving that Hajoca's proffered reasons were pretexts. Herold produced evidence that all the jobs in the Staunton, Virginia, branch were virtually interchangeable. He testified that the company policy, if followed, would have allowed him to "bump" workers with less seniority, even if they were in other job classifications.[4] Herold presented evidence that he could perform all jobs but one and could have performed that one if he had received nominal training. Hr presented evidence from his supervisor and coworkers that his job performance had been good. Herold also presented evidence that when faced with cutbacks, the employer laid off an older truck driver while retaining two younger ones in the same job category.

When viewed in the light most favorable to Herold, and when all reasonable inferences are drawn in Herold's favor, the jury could properly have found that Hajoca's proffered reasons for dismissing Herold were mere pretexts and that it was more likely that age was the real reason for his firing.

The evidence at trial presented two versions of what happened and resolution of the case depended on which

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4. Hajoca has argued that the company's "bumping" policy is irrelevant to the case because a mere violation of seniority rights does not give rise to an ADEA action. The argument misses the point. Herold does not claim that he is entitled to relief merely because he was dismissed and less experienced workers retained. He has introduced evidence of the "bumping" policy only to demonstrate that the company deviated from its normal procedure when it came time to apply the policy to a 56-year-old employee.

witnesses were credible. Determining witness credibility is the job of the jury. The district judge was correct in not taking that task away from the jury and in not overturning the verdict of the jurors once they had made a judgment about which witnesses to believe.

Hajoca points to four ADEA cases in which it has been held that no discrimination was proved and argues that those decisions compel the same result in the instant case. However, there are crucial differences between the facts of those cases and the facts of this one. In *Western Electric, supra,* we reversed a finding of discrimination because the trial court misconstrued the law by requiring the plaintiff to prove only the first three, rather than all four, elements of the *prima facie* case. 713 F.2d at 1015. In addition, the *Western Electric* court found that, even if plaintiffs had made out a prima *facie case,* many of the defendant's proffered reasons for demoting the employees had gone unchallenged by the plaintiffs. *Id.* at 1015-16. Likewise, in three other cases relied on by the appellant — *Fink v. Western Electric Co.,*[5] *Lovelace v. Sherwin-Williams Co.,*[6] and *Smith v. Flax,*[7] — the plaintiffs failed to present adequate evidence contradicting most of the defendants' proffered explanations for their personnel decisions. In the instant case, by contrast, Herold presented evidence directly challenging all of the reasons offered by Hajoca to explain its decision to dismiss him.

In sum, the evidence, when viewed in the light most favorable to the plaintiff, would allow the jury to find that the employer treated Herold differently than younger workers and that Herold's age, rather than the reasons proffered by Hajoca, more likely accounted for

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5. 708 F.2d 909 (4th Cir. 1983)
6. 681 F.2d 230 (4th Cir. 1982)
7. 681 F.2d 1062 (4th Cir. 1980)

the dismissal of Herold. Therefore, the trial court properly denied the motions for a directed verdict and a JNOV on the compensatory damages claim.

II.

Turning to Hajoca's motion for a new trial, we should not reverse a denial of a motion for a new trial unless the trial court clearly abused its discretion. *Taylor,* 777 F.2d at 855. Unlike motions for JNOV or directed verdict, a motion for a new trial allows the trial court to weigh the evidence and assess credibility of witnesses. *Id.* at 855. A court may grant a new trial if the verdict was against the clear weight of the evidence, was based upon false evidence or would result in a miscarriage of justice. *Abasiekong v. Shelby,* 744 F.2d 1055, 1059 (4th Cir. 1984).

Hajoca has argued that the trial court erroneously believed that the standard for ruling on motions for a new trial was identical to that for considering a JNOV motion. Because of this, the contention is made that the trial court only considered the evidence favorable to the plaintiff, rather than the entire evidence in ruling on the motion.

As already explained there was sufficient evidence presented to allow the jury to conclude that Hajoca's proferred explanations for dismissing Herold were mere pretexts and that age was the more likely reason for Herold's discharge. The district judge had authority to assess the credibility of witnesses in light of the evidence. Nothing suggests that he abused his discretion when he concluded that the jury verdict should stand.

III.

[4] We must not disturb the trial court's ruling on the relevancy of the statistical evidence offered by Hajoca unless such decision constituted an abuse of discretion. *See Ward v. Johnson,* 690 F.2d 1098, 1113 (4th

Cir. 1982) (*en banc*). The district judge did not abuse his discretion in excluding Hajoca's statistics on relevancy grounds. The district judge agreed to allow Hajoca to present statistical evidence concerning employees who were terminated at the company's Staunton branch for a period 18 months before and 18 months after the dismissal of Herold. The court refused to allow statistical evidence for the company's Mid-Atlantic region as a whole. It was reasonable to conclude that such region-wide statistics would be of limited probative value in determining whether discrimination took place in one particular branch. Furthermore, the court had to take precautions to ensure against juror confusion. Fed.R.Evid. 403. The district judge could reasonably have concluded that the confusion the statistics might cause for the jury would outweigh their probative value. Hajoca also sought to introduce statistical information for the Staunton facility that covered a period beginning as much as three years before the firing of Herold and up to two years after his layoff. Again, the juror confusion over such statistics could outweigh their probative value.

In sum, the district court was well within its discretion. Therefore, there is no reason to consider the appellee's argument that such statistics could only have been presented with the assistance of experts.

IV.

[5] We will not disturb a trial court's award of attorney's fees and costs absent an abuse of discretion. *Cooper v. Dyke,* 814 F.2d 941, 950 (4th Cir. 1987) (attorneys' fees); *Barber v. Kimbrell's, Inc.,* 577 F.2d 216, 226 (4th Cir., *cert. denied,* 439 U.S. 934, 99 S.Ct. 58 L.Ed.2d 330 (1978) (same); *Flint v. Haynes,* 651 F.2d 970, 973 (4th Cir. 1981), *cert. denied,* 454 U.S. 1151, 102 S.Ct. 1018, 71 L.Ed.2d 306 (1982) (costs). This court emphasized in *Barber* that:

> [T]he allowance of attorneys' fees " 'is within the judicial discretion of the trial judge, who has close and intimate knowledge of the efforts expended and the value of the services rendered. . . .' "

577 F.2d at 226 (citations omitted).

Abuse of discretion did not arise in the matter of an award of $47,382.25 in attorney's fees to Herold's lawyers. Hajoca contends that, because of the contingent fee arrangement, there was abuse of discretion because the district court awarded Herold nearly four times as much as Herold was obligated to pay his counsel. Hajoca argues that the amount due counsel under the contingent fee arrangement imposes a ceiling on the amount of the attorney fees the court may award. We have clearly held to the contrary. *Cooper,* 814 F.2d at 951 (attorneys' fees under 42 U.S.C. § 1988),[8] relying on *City of Riverside v. Rivera,* 477 U.S. 561, 576-80, 106 S.Ct. 2686, 2695-97, 91 L.Ed.2d, 466 (1986).

[6] Appellant also argues that paralegal and law clerk time is by definition not encompassed within the term "attorney's fees." Two of our cases have assumed that paralegal and law clerk time was to be included in attorney's fees. *See Lilly v. Harris-Teeter Supermarket,* 842 F.2d 1496, 1510 (4th Cir. 1988) (paralegals); *Yohay v. Alexandria Employees Credit Union, Inc.,* 827 F.2d 967, 974 (4th Cir. 1987) (law clerks). We are similarly inclined.

Apart from the contingent fee and lawyer/paralegal issues, which we have dealt with, Hajoca has failed to point to a single example where the trial court erred in setting the attorney's fees. The district court clearly explained the basis for its decision examining the twelve factors the court has emphasized should be weighed in setting attorney's fees. *See Barber,* 577 F.2d at 225 &

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8. The standard for award of attorneys' fees in age discrimination cases is the same as that applied in § 1988 actions. *Smith v. University of North Carolina,* 632 F.2d 316, 350 (4th Cir. 1980).

n.28. The district court has made a careful examination of each factor and reached a reasonable conclusion. Accordingly, there has been no abuse of discretion.

[7] Next we meet the argument that the district court erred in taxing as costs expenses for deposition transcripts. Hajoca relies on 28 U.S.C. §1920(4), which allows a judge to tax as costs "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." The district court found that the deposition transcript costs fell within §1920(4) because portions of those transcripts were used at trial. The court did not specify how they were used. Hajoca claims that unless the transcripts themselves were introduced into evidence their cost is not taxable to the defendant. The two district court cases Hajoca has relied on do not support such a proposition. *See Sun Pub. Co. v. Mecklenburg News, Inc.,* 594 F.Supp. 1512, 1524 (E.D. Va. 1984); *Wolfe v. Wolfe,* 570 F.Supp. 826, 829 (D.S.C. 1983). Both decisions would permit taxing deposition expenses as costs if those depositions were used for impeachment purposes. When the district judge said that portions of such depositions were used at trial, no doubt he meant that, although they were not actually introduced in evidence, they were used to impeach witnesses.

[8] Finally, Hajoca has argued that attorney travel expenses are not properly taxable as costs. Hajoca reasons that because neither the ADEA nor the Fair Labor Standards Act,[9] 29 U.S.C. §201, *et seq.,* specifically lists travel expenses as recoverable, a prevailing ADEA plaintiff may only recover for those items enumerated in 28 U.S.C. §1920, the general statutory provision governing taxation of costs. To buttress the argument, appellant relies on *Crawford Fitting Co. v. J.T. Gibbons, Inc.,* 482 U.S. 437, 107 S.Ct. 2494, 96

9. The ADEA incorporates the attorneys' fees provisions of the Fair Labor Standards Act, 29 U.S.C. § 216(b). *See* 29 U.S.C. § 626(b).

L.Ed.2d 385 (1987). Hajoca misunderstands the Supreme Court's decision and Fourth Circuit precedents.

Crawford held that §1920 defines the term "costs" as used in Fed.R.Civ.P. 54(d), which gives trial courts discretion to impose costs on losing parties. *Id.* 107 S.Ct. at 2497. Thus, the Supreme Court reasons, Rule 54(d) does not provide authority to tax as costs those expenses not enumerated in 1920. We have emphasized, however, that, where attorney's fees are expressly authorized by statute (as they are in 29 U.S.C. §216(b)),[10] the trial court is not limited to Rule 54(d), but, in addition, has authority to include litigation expenses as part of a "reasonable attorney's fee." *Wheeler v. Durham City Board of Education,* 585 F.2d 618, 623 (4th Cir. 1978). We have defined such litigation expenses to include "necessary travel." *Id.* Therefore, the trial court did not abuse its discretion in including as costs the travel expenses of the attorneys.

V.

[9] We proceed to consider the propriety of the JNOV overturning the jury's award of liquidated damages. When reviewing a JNOV, an appellate court must view the evidence in the light most favorable to the non-moving party to determine if the jury could properly have found in that party's favor. *Taylor,* 777 F.2d at 854. The ADEA provides that a plaintiff may recover liquidated damages whenever his employer "willfully" violates the Act. 29 U.S.C. §626(b). The jury found a willful violation and assessed liquidated damages against Hajoca. The district judge then granted Hajoca's motion for a JNOV.

The ADEA does not define "willful" but this court has recently provided some guidance in interpreting the term. *See Gilliam v. Armtex, Inc.,* 820 F.2d 1387 (4th

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10. *See* note 9, *supra.*

Cir. 1987). Although *Gilliam* failed to offer an all-inclusive definition of "willful," it upheld a JNOV after a jury finding of willfulness because there was no evidence that "the employer acted in bad faith or with knowledge that its action was so lacking in justification as to warrant a jury's characterization of its conduct as willful." *Id.* at 1390. The Court also cited a Third Circuit case that equated willfulness with outrageousness. *See Dreyer v. Arco Chemical Co.,* 801 F.2d 651 (3d Cir. 1986). We did not, however, explicitly state that we were adopting such a definition. The *Gilliam* court made clear, nevertheless, that mere knowledge that the ADEA prohibited age discrimination and mere failure to obtain legal advice before dismissing an older employee did not constitute willfulness. Otherwise, reasoned the court in *Gilliam,* nearly every ADEA violation would result in liquidated damages. *Gilliam* further suggested that the Fourth Circuit would be hesitant to find willfulness where an economic downturn was a factor in the plaintiff's dismissal. *Id.* at 1390.

In light of *Gilliam,* the district court was correct in granting the motion for a JNOV.[11] Herold's counsel argues that three facts support the jury finding of willfulness: (1) the defendant knew that ADEA prohibited age discrimination; (2) the defendant knew that employees laid off were older than some of the workers retained; and (3) the defendant failed to seek or receive any legal advice or guidelines for complying with ADEA. The arguments do not suffice to validate a liquidated damages award.

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11. Herold's assertion that JNOV is improper because Hajoca failed to object to the jury instructions on willfulness is without merit. The Fourth Circuit decided *Gilliam* between the time of the jury instruction and the granting of the JNOV motion. At the time of trial Hajoca could not be held to anticipate the Fourth Circuit's *Gilliam* decision.

VI.

In conclusion:

A. The district court did not err in denying Hajoca's motions for summary judgment, for a directed verdict and for JNOV.

B. The district court did not abuse its discretion in denying Hajoca's motion for a new trial.

C. The district court did not abuse its discretion in excluding Hajoca's statistical evidence.

D. The district court did not abuse its discretion in awarding attorney's fees and costs to Herold.

E. The district court did not err in entering a JNOV overturning the jury's award of liquidated damages.

In all respects the judgment is
AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

WARREN G. HEROLD	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
HAJOCA CORPORATION	:	
Defendant.	:	NO. 83-0128-H

MEMORANDUM OPINION

MICHAEL, District Judge

This matter comes before the court upon plaintiff's motion for equitable relief and attorneys' fees. Plaintiff's age discrimination claim was tried to a jury on January 6 and 7, 1987. The jury returned a verdict against the defendant Hajoca Corporation awarding plaintiff $40,642.66 in actual damages and an equal amount as liquidated damages based on the jury's finding that the defendant willfully violated the Age Discrimination in Employment Act (ADEA). 29 U.S.C. §626(b). The parties agreed that the remaining claims for relief, including attorneys' fees and costs, would be decided by the court at a later date. The court postponed entering judgment on the jury verdict pending resolution of the present motion and a motion by the defendant for judgment notwithstanding the verdict.

On May 1, 1987, the court heard argument on defendant's motion for judgment notwithstanding the verdict. The court denied the motion and entered an order to that effect on June 12, 1987. On June 25, 1987, the Court of Appeals for the Fourth Circuit issued its

opinion in *Gilliam v. Armtex, Inc.,* 820 F.2d 1387 (4th Cir. 1987), which discusses the showing a plaintiff must make to receive an award of liquidated damages under the ADEA. Before addressing the plaintiff's motion, therefore, the court believes it should reexamine its ruling on the defendant's motion for judgment notwithstanding the verdict in light of the Fourth Circuit's conclusions in *Gilliam.*

Defendant's Motion for Judgment Notwithstanding the Verdict

[1] In *Gilliam,* a jury had returned verdicts for both compensatory and liquidated damages against the employer. The district court judge granted the defendant's motion for judgment notwithstanding the verdict as to the liquidated damages, but denied the motion as to the compensatory damages. On appeal, the Court of Appeals for the Fourth Circuit affirmed the ruling of the district court. The appeals court began its analysis by noting that in providing for liquidated damages for willful violations of the ADEA, Congress had neglected to define the term "willful."

> The omission has led to contentions, such as that advanced substantially by the plaintiff here, that a finding of willfulness is appropriate if the employer knows that there is such a thing as the ADEA protecting older employees and takes an adverse employment action with respect to an older employee because of his age. This is not enough to support the willfulness finding, however.

820 F.2d at 1390. The court went on to conclude that evidence that an employer was aware of the ADEA and failed to seek advice about compliance with its terms does not constitute a sufficient basis for a finding that the employer willfully violated the statute. In the present case, Vernon Garber, who was manager at the Staunton branch where the plaintiff worked, testified that he was

aware of the existence of the ADEA and that the statute prohibited discrimination against workers on account of age. He further testified that he never sought or received any advice from his home office as to how to conduct layoffs without violating the statute. Under *Gilliam,* this evidence is insufficient to justify a finding that the defendant willfully violated the ADEA. As the court of appeals stated, "[T]here must be something more than a retrospective finding by a jury that there was a simple violation of the statute." 820 F.2d at 1390.

Accordingly, the court will vacate its previous order and grant defendant's motion for judgment notwithstanding the verdict as to the judgment for liquidated damages. The court will deny the motion as to the judgment for compensatory damages for the reasons stated at the hearing on May 1, 1987.

Plaintiff's Motion for Equitable Relief and Attorneys' Fees

The parties have stipulated to the facts necessary for the court's disposition of the motion, and have waived oral argument. For the reasons set forth below, the court will grant plaintiff's motion for equitable relief and award $47,382.25 in attorneys' fees and $1,042.42 in costs.

1. Equitable Relief

In addition to the damages awarded by the jury, the plaintiff seeks equitable relief in the form of lost pension benefits. Based on the record adduced at trial, the court concludes that such relief is appropriate. The parties have stipulated that had the plaintiff voluntarily retired on January 7, 1987, the date the verdict was returned, his monthly pension benefit would have been $154.99. Accordingly, the court will order that the plaintiff's monthly pension benefit be increased to $154.99, retroactive to January 7, 1987.

2. Attorneys' Fees

The Age Discrimination in Employment Act (ADEA), at 29 U.S.C. §626(b), incorporates by reference the attorneys' fees and costs provisions of the Fair Labor Standards Act, 29 U.S.C. § 216. In applying these provisions, courts have generally used the analysis used for other civil rights statutes. *See Smith v. Univ. of North Carolina,* 632 F.2d 316, 350 (4th Cir. 1980); *Spagnuolo v. Whirlpool Corp.,* 641 F.2d 1109, 1115 (4th Cir. 1981) (citing *Walston v. School Bd. of Suffolk,* 566 F.2d 1201, 1204-05 (4th Cir. 1977) and approving use of criteria therein for fixing fees in an ADEA case). This analysis, based on factors set forth in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), has been refined as a result of the Supreme Court's decision in *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). In *Daly v. Hill,* 790 F.2d 1071, 1078 (4th Cir. 1986), the Court of Appeals for the Fourth Circuit stated:

> Consequently, *Blum* has shifted the timing of the *Johnson* analysis, as it has been applied in this circuit. The proper point at which the *Johnson* factors are to be considered is in determining the reasonable rate and the reasonable hours. A fee based upon reasonable rates and hours is presumed to be fully compensatory without producing a windfall. In "exceptional circumstances," this presumptively fair lodestar figure may be adjusted to account for results obtained and the quality of representation. (Footnote omitted.)

Following *Daly,* this court will use the *Johnson* factors to determine whether the fee claimed by plaintiff's attorneys is based on reasonable rates and reasonable hours.

Attorneys for plaintiff seek compensation for hours and rates as follows:

Attorney	Hours	Rate	Fee
Edward B. Lowry	143.9	$110.00	$15,829.00
Elizabeth P. Coughter	119.5	75.00	8,962.50
Robert W. Jackson	314.4	70.00	22,008.00
Subtotal			$46,799.50
Paralegals	46.2	$ 35.00	$ 1,617.00
Law Clerks	78.4	35.00	2,744.00
Total			$51,160.50

Plaintiff's attorneys have submitted detailed summaries of their time records, as well as an affidavit from a member of the local bar attesting that the rates requested are reasonable and customary rates for local attorneys of like experience, skill, and reputation. The court will consider each of the *Johnson* factors in light of these materials and the record of the case.

[2, 3] As to the time and labor required (factor 1), counsel for plaintiff unquestionably devoted a great deal of both to the case. Some of this time and labor, however, was consumed developing and presenting a disparate impact theory of discrimination, which plaintiff withdrew at a hearing on November 25, 1985. At the court's request, plaintiff's attorneys submitted a memorandum detailing the hours devoted to the disparate impact theory:

Attorney	Hours	Rate	Fee
Edward B. Lowry	21.4	$110.00	$2,354.00
Elizabeth P. Coughter	43.0	75.00	3,225.00
Robert W. Jackson	16.9	70.00	1,183.00
Paralegal	22.7	35.00	794.50
Total			$7,556.50

Because this work was not required for the plaintiff's ultimate victory on a disparate treatment theory,

the court would ordinarily disallow the fees claimed. Here, however, a substantial portion of the fees resulted from preparing and arguing a motion to compel discovery which the court granted. The court therefore will allow one half of the fees claimed for work on the disparate impact claim.

With regard to the second and third *Johnson* factors, the court finds that the questions presented by the case were not novel, but that the case certainly posed difficulties from an evidentiary standpoint and required a high degree of skill to win. Certainly, the skills of Mr. Lowry, an experienced trial attorney, were not wasted on the case.

The amount of time devoted to this case over a four-year period necessarily precluded acceptance of some other cases at the going rate (factor 4). In addition, the attorneys represented plaintiff for this matter only; they do not represent him generally. These two factors weigh in favor of fixing the fee at the attorneys' normal hourly rate. The parties have stipulated that the rates requested are the customary hourly rates for plaintiff's attorneys (factor 5). The affidavit of a local attorney indicates that the rates are reasonable for this area.

[4] Plaintiff's attorneys undertook representation upon a contingent fee agreement (factor 6). Because they would have received no fee at all had plaintiff lost, they seek an upward adjustment of the overall award. Since the award based on the requested hours and rates exceeds the amount counsel could have received under the normal contingent fee arrangement, however, the court will decline to adjust the fee award upward. Counsel obtained the best results possible in the case, and the amount involved was certainly not insubstantial (factor 8). Nevertheless, the court finds that a fee computed on the basis of the hours and rates requested will be fully compensatory.

As to the remaining *Johnson* factors, the experience, reputation and ability of the attorneys (factor 9) is

reflected in their hourly rates. The parties agree that no time limitations were imposed by the client or the circumstances (factor 7) and that the case was not of an undesirable nature (factor 10). An award based on the hours and rates requested by counsel, minus one half the hours spent on the disparate impact claim, is in keeping with awards made in similar cases in this court (factor 12).

Weighing all of these factors, the court finds that the rates requested by plaintiff's attorneys are reasonable. The court will award the following fees based upon the reasonable rates requested and approved by the court and reasonable hours as calculated by the court:

Attorney	Hours	Rate	Fee
Edward B. Lowry	133.2	$110.00	$14,652.00
Elizabeth P. Coughter	93.5	75.00	7,350.00
Robert W. Jackson	305.95	70.00	21,416.50
Subtotal			$43,418.50
Paralegals	34.85	$ 35.00	$ 1,219.75
Law Clerks	78.4	35.00	2,744.00
Total			$47,382.25

[5] In making this determination, the court notes that in the Fourth Circuit, fees for paralegal and law clerk assistance are recoverable as part of an overall award of attorneys' fees and costs. *Payne v. Travenol Laboratories, Inc.* 74 F.R.D. 19, 23 (N.D. Miss. 1976), cited in *Wheeler v. Durham Bd. of Educ.* 585 F.2d 618, 624 (4th Cir. 1978). Having determined the lodestar figure, the court finds no exceptional circumstances which would justify adjusting this figure and concludes that an award of $47,382.25 is fully compensatory without producing a windfall.

Cost and Expenses

[6] Plaintiff's attorneys have requested $1,042.42 in costs and expenses, consisting of the filing fee, witness fees, mileage for attorneys, and fees for deposition

transcripts and a trial transcript. The filing fee and witness fees are taxable as a matter of course in all actions in federal court under 28 U.S.C. §1920. The fee for the trial transcript would likewise be routinely taxed as costs §1920, since the transcript was necessarily obtained to argue against the defendant's motion for judgment notwithstanding the verdict and motion for new trial. The court therefore will award all of these costs.

[7] In civil rights cases, taxable costs are not limited to those listed in §1920. In *Wheeler v. Durham City Bd. of Educ.,* 585 F.2d 618 (4th Cir. 1978), the Court of Appeals for the Fourth Circuit held that the statutory authorization of reasonable attorney's fees in civil rights cases includes litigation expenses. Attorneys' fees awards under the ADEA are specifically limited to prevailing plaintiffs. 29 U.S.C. §216 (b). A prevailing defendant may recover only those costs set forth in 28 U.S.C. §1920. *Hackett v. Stuckey's, Inc.* 670 F.Supp. 172 (W.D. Va. 1987).

[9] In addition to the costs provided for in §1920, plaintiff here has claimed attorneys' mileage and fees for deposition transcripts. The cost of necessary travel is an expense specifically mentioned in *Wheeler,* 585 F.2d at 623. As for the depositions, the court finds that they were reasonably taken in preparation for trial; indeed, portions of the depositions were actually used at trial. The costs of the depositions are certainly recoverable as litigation expenses. *See Marcoin, Inc. v. Williams,* 88 F.R.D. 588, (E.D. Va. 1980).

Defendant argues that the Supreme Court's recent decision in *Crawford Fitting Co. v. J.T. Gibbons,* U.S., 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987) forbids taxing costs which are not listed in 28 U.S.C. §1920. The court disagrees. *Crawford* is specifically limited to the question of reimbursement for fees paid to expert witnesses. The Court of Appeals for the Fourth Circuit previously addressed this question in *Wheeler,* concluding that

such fees were not recoverable. 585 F.2d at 624. Thus, the rule announced in *Crawford* is not a new one in the Fourth Circuit.

For the foregoing reasons, the court will award the full $1,042.42 in costs, along with $47,382.25 in attorney's fees. An appropriate order shall this day issue.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

as follows:

1. The Order of this court entered June 12, 1987, shall be, and it hereby is, vacated.

2. Defendant's motion for judgment notwithstanding the verdict shall be, and it hereby is, granted as to the verdict for liquidated damages.

3. Defendant's motion for judgment notwithstanding the verdict shall be, and it hereby is, denied as to the verdict for compensatory damages.

4. Judgment shall be, and it hereby is, entered in favor of plaintiff in the amount of $40,642.66.

5. The defendant shall be, and it hereby is, ordered to increase plaintiff's monthly pension benefit to $154.99, retroactive to January 7, 1987.

6. Plaintiff's counsel shall be, and they hereby are, awarded $47,382.25 in attorney's fees.

7. Plaintiff shall be, and he hereby is, awarded $1,042.42 as costs, to be taxed according to the bill of costs filed by plaintiff on October 13, 1987.

8. This action shall be, and it hereby is, dismissed and stricken from the docket of this court.

Supreme Court, U.S.
FILED
MAY 19
JOSEPH F. SPANIOL, JR.
CLERK

(2)

No. 88-1697

In The

Supreme Court of the United States

October Term, 1989

HAJOCA CORPORATION,

Petitioner,

v.

WARREN G. HEROLD,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Whether the evidence demonstrating an intent to discriminate on the basis of age was sufficient to justify the trial court in over-ruling the defendant's motion for a directed verdict and in submitting the plaintiff's claim of age discrimination to the jury.

PARTIES

The parties to the proceedings in the court below were: Warren G. Herold, an individual, and Hajoca Corporation.

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No. 88-1697

In The

Supreme Court of the United States

October Term, 1989

HAJOCA CORPORATION

Petitioner,

v.

WARREN G. HEROLD

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

The Respondent, Warren G. Herold, by counsel, hereby submits his Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The opinion of the Fourth Circuit Court of Appeals (the "Fourth Circuit"), dated December 22, 1988, is reported at 864 F.2d 317, and appears in the appendix to this brief ("Brief Appendix") at A-2 to A-15. The opinion

of the United States District Court for the Western District of Virginia, dated February 18, 1988, is reported at 682 F. Supp. 297, and is reproduced in the Brief Appendix at A-16 to A-24. The order of the Fourth Circuit, dated January 19, 1989, denying Petitioner's Petition for Rehearing is unreported and is reproduced in the Brief Appendix at A-1.

JURISDICTIONAL STATEMENT

The Respondent adopts the Jurisdictional Statement of the Petitioner.

STATUTE INVOLVED

The Respondent adopts the statement of Statute Involved of the Petitioner.

STATEMENT OF THE CASE

The Respondent, Warren G. Herold ("Herold"), was continuously employed by the Petitioner, Hajoca Corporation, ("Hajoca") from 1955 to 1982. Joint Appendix at 34.[1] Hajoca operates a wholesale and retail plumbing and heating supply business nationwide and has a branch office in Staunton, Virginia ("Staunton Branch"). Herold

[1] The Respondent joins the Petitioner in referring to the "Joint Appendix" as that part of the record contained in the joint appendix filed in connection with Petitioner's appeal to the Fourth Circuit.

worked exclusively in the warehouse/delivery department of the Staunton Branch. He was laid off from the Staunton Branch on March 12, 1982, at the age of 56, Joint Appendix at 34, which resulted in this case under the Age Discrimination in Employment Act, 29 U.S.C. § 621, et seq. (the "ADEA").

Herold filed his ADEA complaint in the United States District Court for the Western District of Virginia on October 14, 1983. The case was tried to a jury on January 6 and 7, 1987, which returned a verdict for Herold in the amount of $40,642.66 in actual damages and an equal amount as liquidated damages on account of a willful violation of ADEA. On February 18, 1988, the district court granted Hajoca's motion for J.N.O.V. with respect to the claim for liquidated damages and denied Hajoca's motion for J.N.O.V. with respect to compensatory damages. The district court also awarded Herold retroactive pension benefits, costs and attorneys' fees. Hajoca appealed and Herold cross-appealed. The Fourth Circuit affirmed the district court's decision in all respects, including that court's denial of Hajoca's motion for a directed verdict, the subject of this petition. In reviewing Hajoca's motion for a directed verdict[2] the Fourth Circuit stated:

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[2] The Fourth Circuit reviewed Hajoca's motion for a directed verdict under the applicable standard stated in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986): "[t]his standard [for summary judgment] mirrors the standard for a directed verdict under Federal Rule of Civil Procedure 50 (a), which is that a trial judge must direct a verdict if, under the

(Continued on following page)

> When viewed in the light most favorable to Herold, and when all reasonable inferences are drawn in Herold's favor, the jury could properly have found that Hajoca's proffered reasons for dismissing Herold were mere pretexts and that it was more likely that age was the real reason for his firing.

Brief Appendix at A-7.

Herold first worked at the Staunton Branch as a truck driver and was promoted to inside "order picker" in 1962, the warehouse employee responsible for preparing orders for delivery to customers. Joint Appendix at 34. Herold was promoted to shipping clerk in 1965, the position he held until his layoff. *Id.* at 35. The other positions in the warehouse of the Staunton Branch consisted of truck driver, receiving clerk, counter man (who was responsible for inside sales to walk-in customers) and warehouse superintendent. *Id.* at 36. In addition to having been a truck driver, Herold had experience working as the counter man, and believed he was qualified to do that work. He also relieved the warehouse superintendent when that person was on vacation or sick leave; during those periods, he performed the duties of superintendent, as well as his own functions as shipping clerk. Vernon Garber, the Staunton Branch manager ("Garber"), admitted that during those periods Herold was responsible for virtually everything that went on in the warehouse and reported directly to Garber. *Id.* at 74. Herold

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(Continued from previous page)

governing law, there can be but one reasonable conclusion as to the verdict. If reasonable minds could differ as to the import of the evidence, however, a verdict should not be directed." *Id.* (citations omitted).

and other witnesses testified that the jobs in the warehouse were interchangeable, that each warehouse employee performed the various job functions in the warehouse and that Herold was qualified to perform the other jobs in the warehouse. *Id.* at 37, 59, 102, 106-109, 114-115.

Contrary to Hajoca's assertion that Garber was the only person to testify on the existence of a "bumping" policy, Petition at 6, n. 4, Herold testified that the Staunton Branch had a policy of laying-off employees according to years of service in the event of a reduction in force, and that he was first informed of this when he was hired in 1955. The policy was also stated by Garber in an employee meeting called in 1975. Herold testified that this policy was followed until he was laid off. Joint Appendix at 38. After the 1975 meeting, and consistent with the reduction-in-force policy, Richard Tanksley, the most junior person in the warehouse, was laid off according to years of service. Later, warehouse worker Danny Doyle was also laid off according to years of service, as were two female office workers. *Id.* at 39. Other evidence corroborating Herold's testimony concerning the reduction-in-force policy of bumping was offered at trial, but was barred by the district court, in response to Hajoca's objection that the existence of such a "bumping policy" was irrelevant. Joint Appendix at 98-100.

On the morning of March 12, 1982, Herold went to work as usual and was directed to Garber's office where Garber told him that he was being laid off. Garber gave no response to Herold's questioning as to why he was being laid off contrary to the stated rule and custom. His only justification for the layoff was the need to reduce the number of workers in the warehouse. *Id.* at 41. Garber

first testified that he would have given Herold a good reference, that the quality of his performance was not in question in the layoff, *id.* at 81, and that his work had been entirely satisfactory. *Id.* at 85. He later testified that his decision to lay off Herold was based on the decision to keep the "best" people. *Id.* at 94. Garber also admitted that he retained the two younger truck drivers in the warehouse, and laid off Charles Howdyshell, the oldest truck driver in the warehouse, on the same day as Herold was terminated. *Id.* at 45, 91. When Herold was laid off, there were other men working in the warehouse who were both younger than him and who had fewer years of service with Hajoca, one of whom was less than forty years old and, therefore, outside the scope of ADEA protection. *Id.* at 44.

ARGUMENT WITH RESPECT TO REASONS FOR DENYING THE WRIT

I. THE DECISION BELOW IS IN ACCORD WITH THE PRINCIPLES ESTABLISHED BY THIS COURT

Both the district court and the Fourth Circuit properly applied the familiar scheme of proof established in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981) to the evidence of record. As Circuit Judge Murnaghan noted, the essential issue in this case was one of credibility:

> The evidence at trial presented two versions of what happened and resolution of the case depended on which witnesses were credible. Determining witness credibility is the job of the jury. The district judge

> was correct in not taking that task away from the jury and in not overturning the verdict of the jurors once they had made a judgment about which witnesses to believe.

Brief Appendix at A-7 and A-8.

Hajoca seeks to recast this ordinary evidentiary dispute into one in which a "fundamental issue of Federal employment discrimination law" is involved. Petition at 7. No such case is presented. In substance, Hajoca urges that the jury should have believed Hajoca's witnesses and disbelieved those of Herold. The jury found evidence sufficient to support a determination that Herold was the victim of intentional age discrimination. Both the district court and the Fourth Circuit viewed the evidence as sufficient to allow the case to be decided by the jury and to support the jury's verdict. Hajoca now seeks a *fourth* review of the factual dispute in this case, already resolved three times in Herold's favor.

Hajoca's essential criticism of the Fourth Circuit's decision is that it purportedly allowed Herold to prevail "without presenting any evidence, direct or indirect, that [Herold's] employer's judgment was in fact motivated by an intent to discriminate." Petition at 8. That criticism ignores the plain language of the Fourth Circuit's opinion and the evidence of record. The Fourth Circuit began its analysis of this case by pointing out that, in ADEA cases, the plaintiff is entitled to use the three-stage *McDonnell Douglas* scheme of proving discrimination originally formulated for cases under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e, *et seq.*:

> First, the plaintiff must establish a *prima facie* case of age discrimination. If he succeeds, the burden of

> production shifts to the defendant to articulate a nondiscriminatory reason for treating the plaintiff as he did. Once the defendant does that, the plaintiff must bear the burden of proving that he was *the victim of intentional discrimination*. He can do this by demonstrating that the defendant's proffered reason was a mere pretext and that, as between the plaintiff's age and the defendant's explanation, age was the more likely reason for the dismissal.

Brief Appendix at A-5. (citations omitted, emphasis added).

The Fourth Circuit also appropriately applied the *McDonnell Douglas* scheme of proof to this reduction in force case:

> In a reduction-in-force case . . . a plaintiff must show four things to make out a *prima facie* case under ADEA: (1) that he is in the protected age group, (2) that he was discharged, (3) that at the time of the discharge, he was performing his job at a level that met his employer's legitimate expectations, and (4) that persons outside the protected age class were retained in the same position or that there was some other evidence that the employer did not treat age neutrally in deciding to dismiss the plaintiff.

Id. (citations omitted). As the Fourth Circuit stated, a plaintiff could satisfy this standard for establishment of a prima facie case by showing that his employer treated an older worker differently than younger employees in similar positions. *Id.*

The Fourth Circuit held that Herold established a *prima facie* case. It observed that Herold presented evidence that he was dismissed while younger workers in similar positions, at least one of whom was under 40,

were retained. Brief Appendix at A-6. He presented evidence that all of the jobs in the Staunton Branch warehouse were virtually interchangeable and that he could perform all of those jobs, with the possible exception of one position which would have required minimal retraining.

Each worker had a job designation and primary responsibilities from day to day. Each of them had not only substituted for one another on occasion but had held many of these other jobs. All of the witnesses testified that Herold was a capable worker and as good a worker as anyone in the warehouse. *Id.* Even Garber testified that he would have given Herold a good recommendation and that the quality of his work was not in question in the layoff. Joint Appendix at 81. Herold presented evidence that Hajoca had laid off an older truck driver, while retaining two younger truck drivers, on the same day as Herold was dismissed. Joint Appendix at 45, 91; Brief Appendix at A-7. It was Herold's evidence that Hajoca's long-standing policy of laying off less senior employees first when faced with an economic turndown was violated in his case.[3] As the Fourth Circuit correctly pointed

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[3] As it has throughout this case, Hajoca continues to argue that Herold presented no evidence concerning this "bumping policy" (*see*, Petition at 6-7, n. 4), in the face of clear record evidence to the contrary as set forth in the Statement of the Case above. Apparently, Hajoca believes that since Herold did not expressly describe the reduction-in-force policy as a "bumping" policy that there was no evidence on the point. That position flies in the face of common sense and ordinary English usage. The position asserted by Hajoca in its Petition is also inconsistent with its position at trial that the existence of

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out, Herold did not claim that he was entitled to relief merely because he was dismissed while less experienced or less senior workers were retained. The violation of the reduction-in-force policy was introduced solely to demonstrate that Hajoca had deviated from its established procedures when it came to dismissing Herold. Brief Appendix at A-7, n. 4. The Seventh Circuit has also recognized that an employer's failure to follow its own reduction-in-force policy may support a finding that its asserted reason for the employment action was a pretext for age-related discrimination. *Christie v. Foremost Insurance Company*, 785 F.2d 584, 586 (7th Cir. 1986).

The purported justification for Garber's decision to terminate Herold was to reduce the work force. Garber suggested that he chose to eliminate Herold's job because someone else could do the work. In fact, the evidence before the jury showed that statement could have been made of every job in the warehouse, not just Herold's job; Herold's evidence further demonstrated that, for all material purposes, these younger men *were* performing the same job functions interchangeably. The treatment afforded Charles Howdyshell, who was terminated on the same day as Herold, also revealed much about Hajoca's motivation in this group of layoffs: Howdyshell was the oldest of three truck drivers in the warehouse, but was laid off in favor of the two younger drivers who were performing the same job functions. Joint Appendix at 45, 91.

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such a policy was irrelevant, and with which Hajoca successfully blocked Herold's attempt to introduce the testimony of other workers to corroborate his statement with regard to that policy. Joint Appendix at 98-100.

The pretextual nature of Garber's explanation for the layoff, and Garber's lack of credibility, was further disclosed in his testimony concerning the alleged need to "retrain" Herold for the position of truck driver. Garber testified initially that he did not believe Herold would qualify to perform the duties of truck driver; when cross-examined, however, Garber admitted that the only "retraining" Herold would require in order to qualify as a truck driver would be the receipt of a highway map and the addresses for deliveries. *Id.* at 91. The jury was able to observe Garber's demeanor on the stand, in this as well as other instances, and make their own determination of his credibility.

The record shows substantial, albeit circumstantial, evidence from which the jury could reasonably have inferred both pretext and an intent to discriminate against Herold on the basis of his age. Wrongful acts of discrimination are not normally committed in the clear light of day; they are done covertly, sometimes even under the guise of rational decision-making. Ordinarily, the only available evidence is circumstantial. The *McDonnell Douglas* framework appears to have been designed, in part, to address these problems of proof.

This case is readily distinguishable from *Harbison-Walker Refractories v. Eugene F. Brieck*, No. 86-3068, slip op. (3d Cir. June 19, 1987), *cert. granted*, 108 S.Ct. 1218 (1987), *cert. withdrawn*, 57 U.S.L.W. 4063 (December 12, 1988), which Hajoca plainly seeks to imitate.[4] There, the district

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[4] It cannot be coincidental that the question presented as phrased in the Petition in this case is almost word-for-word identical to the one contained in the Petition in

(Continued on following page)

court granted summary judgment on the grounds that the plaintiff failed to present evidence that age was a "determinative factor" in the employer's decision or that the employer's justification for its decision was a pretext for age discrimination. *Brieck v. Harbison-Walker Refractories, a Division of Dresser Industries*, 624 F. Supp. 363, 366 (W.D. Pa. 1985). The Third Circuit reversed, holding that an ADEA plaintiff could defeat a summary judgment motion by presenting evidence "of inconsistencies and implausibilities in the employer's proffered reasons for discharge (which) reasonably *could* support an inference that the employer did not act for (those) nondiscriminatory reasons." *Harbison-Walker Refractories v. Eugene F. Brieck*, No. 86-3068, slip op. at 2a, (3d Cir. June 19, 1987). On the record before it, the Third Circuit held that the plaintiff had sustained his burden at the summary judgment stage: "The question is not whether the employer's asserted reason is plausible, but whether there is also evidence of record which, if credited, could render the reason implausible." *Id.* at 5a, 6a.

Herold did more than demonstrate the *implausibility* of Hajoca's proffered reason for the lay-off, or that Hajoca's decision constituted no more than an unwise

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Harbison: "Whether a plaintiff who alleges intentional discrimination can survive summary judgment merely by questioning his employer's business judgment, without presenting any evidence, direct or indirect, that his employer's judgment was in fact motivated by an intent to discriminate." This Court originally granted a writ of certiorari in *Harbison*, which was later withdrawn as having been improvidently granted.

personnel move, although his evidence did that as well. Herold presented evidence from which the jury could properly have determined that Hajoca treated Herold differently from its other similarly situated Staunton Branch warehouse employees because of his age.

It is apparent that the actual basis for Hajoca's request for review is simply its belief that the jury should have reached a different result. Its petition presents no other supportable basis for review. It points to no error in this case except its belief that the Fourth Circuit requires no "nexus between [the plaintiff's evidence] and age discrimination." Petition at 14. In light of the Fourth Circuit's express requirement of proof of intentional discrimination, Hajoca cannot, in good faith, argue that the Fourth Circuit does not view intentional age-related discrimination as an essential element of an ADEA claim. Instead, it must take the position that there was insufficient e .ence to support such a finding. Hajoca is simply not entitled to a fourth review of the facts on this issue. The only issue presented for review by this Court depends on no more than an assessment of which witnesses should have been believed. That issue has significance only to the parties to this case.

II. THE DECISION OF THE COURT BELOW IS NOT IN CONFLICT WITH OTHER CIRCUITS

Hajoca states that the decision below allows an ADEA plaintiff to sustain his burden of "pretext" by merely questioning an employer's business judgment without a showing of intent to discriminate, thus creating a conflict among the circuits as to the appropriate legal

standard. This proposition misstates the opinion of the Fourth Circuit and asserts a conflict where none exists.

As in this case, the Fourth Circuit has consistently held elsewhere that proof of an intent to discriminate on account of age is essential to a claim under ADEA. *See, Goldberg v. B. Green And Company, Inc.*, 836 F.2d 845 (4th Cir. January 14, 1988) (to establish a cause of action under ADEA, the plaintiff must prove, inter alia, that, but for the employer's motive to discriminate against him because of his age, he would not have been dismissed); *Taylor v. The Home Insurance Company*, 777 F.2d 849, 851 (4th Cir. 1985), *cert. denied*, 476 U.S. 1142 (1986), (the plaintiff has the burden of proving adverse action would not have been taken "but for" a motive to discriminate); *Lovelace v. Sherwin-Williams Company*, 681 F.2d 230, 239 (4th Cir. 1982) ("where – as here, and ordinarily – coverage [under the ADEA] and unfavorable action are not disputed, the dispositive and only issue is the difficult, but narrow, motivational one: whether the employee was [treated unfavorably] because of his age").

In the Fourth Circuit a plaintiff cannot meet his burden of proof merely by questioning his employer's business judgment: "an employer may not properly be found in violation of the ADEA simply because it exercised poor business judgment, gauged objectively, in treating unfavorably an employee within the protected age group on grounds other than age." *Cline v. Roadway Express, Inc.*, 689 F.2d 481, 487, n. 7 (4th Cir. 1982). The Fourth Circuit is entirely in accord with, and not in conflict with, those circuits to which Hajoca refers.

CONCLUSION

For the foregoing reasons, the Respondent respectfully requests that the Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit be denied.

Respectfully Submitted,

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Dated: May 18, 1989

APPENDIX

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3955
No. 88-3967

WARREN G. HEROLD,
Plaintiff-Appellee,

v.

HAJOCA CORPORATION,
Defendant-Appellant.

ON PETITION FOR REHEARING WITH SUGGESTION FOR REHEARING IN BANC

The petition for rehearing and suggestion for rehearing in banc of Hajoca Corporation were submitted to this Court. As no member of this Court or the panel requested a poll on the suggestion for rehearing in banc, and

As the panel considered the petition for rehearing and is of the opinion that it should be denied,

IT IS ORDERED that the petition for rehearing and suggestion for rehearing in banc are denied.

Entered at the direction of Judge Murnaghan, with the concurrence of Judge Chapman and Judge Williams, United States District Judge sitting by designation.

FOR THE COURT

/s/ JOHN M. GREACEN
CLERK

Dated: January 19, 1989

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 88-3955
No. 88-3967

WARREN G. HEROLD,
Plaintiff-Appellee,

v.

HAJOCA CORPORATION,
Defendant-Appellant.

ON PETITION FOR REHEARING WITH
SUGGESTION FOR REHEARING IN BANC

Argued Oct. 6, 1988.

Decided Dec. 22, 1988.

**Rehearing and Rehearing In Banc
Denied Jan. 19, 1989.**

**Before: MURNAGHAN and CHAPMAN,
Circuit Judges, and WILLIAMS,
United States District Judge
for the Eastern District of Virginia,
sitting by designation.**

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OPINION OF THE COURT

MURNAGHAN, Circuit Judge

An Age Discrimination in Employment action[1] confronts us here. The plaintiff, Warren G. Herold, was in part successful. His compensatory award should prevail over defendant Hajoca Corporation's motions for summary judgment, directed verdict and judgment *non obstante veredicto,* because Herold was able to demonstrate a failure of Hajoca to follow an announced policy of laying off the shorter time employees among those qualified when lack of work result in termination. Herold showed there were several (perhaps four) younger employees retained when he was terminated who had less time in service than he did. However, as to the jury's award of a liquidated (punitive) damages amount equal to the compensatory award, the district judge correctly ordered entry of judgment *non obstante veredicto.* 682 F.Supp. 297.

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1. Under the Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634, hereinafter "ADEA".

I.

In considering a motion for directed verdict or for a JNOV, the trial court is to apply the same standard: whether, viewing the evidence in the light most favorable to the nonmoving party and giving him the benefit of all reasonable inferences, there is sufficient evidence in the record to support a jury verdict in his favor.[2] *Taylor v. Home Ins. Co.*, 777 F.2d 849, 854 (4th Cir. 1985), *cert. denied*, 476 U.S. 1142, 106 S.Ct. 2249, 90 L.Ed.2d 695 (1986); *Wilhelm v. Blue Bell Inc.*, 773 F.2d 1429, 1433 (4th Cir. 1985), *cert. denied*, 475 U.S. 1016, 106 S.Ct. 199, 89 L.Ed.2d 313 (1986). The court must not weigh the evidence or assess the credibility of witnesses. *Taylor*, 777 F.2d at 854. In reviewing a grant or denial of a motion for a JNOV or directed verdict, the appellate court is to apply the same standard that governed the trial court's determination. *Lust v. Clark Equipment Co.*, 792 F.2d 436, 438 (4th Cir. 1986).

The Court has cautioned against granting motions for directed verdict and JNOV in discrimination cases where motive and causation are at issue:

> Determination of motive is ordinarily a function within the purview of the fact finder because so much depends on an assessment of the credibility of the witnesses. A finding of motive should not be set aside by the reviewing court unless the evidence clearly compels rejection.

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2. A decision on the compensatory aspect of the case against Hajoca on its JNOV and directed verdict motions eliminates the need for this Court to address the summary judgment argument. The standard for considering a motion for summary judgment "mirrors the standard for a directed verdict under Federal Rules of Civil Procedure 50(a)." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250, 106 S.Ct. 2505, 2511, 91 L.Ed.2d 202 (1986).

Taylor, 777 F.2d at 854 (trial court did not err in denying defendant's motion for directed verdict and JNOV in ADEA case).

In ADEA cases, the Fourth Circuit permits plaintiffs to use the three-stage scheme of proof originally formulated for Title VII cases.[3] *EEOC v. Western Electric Co.,* 713 F.2d 1011, 1014 (4th Cir. 1983). *See Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248, 101 S.Ct. 1089, 67 L.Ed.2d 207 (1981); *McDonnell Douglas Corp. v. Green,* 411 U.S. 792, 93 S.Ct. 1817, 36 L.Ed.2d 668 (1973). First, the plaintiff must establish a *prima facie* case of age discrimination. If he succeeds, the burden of production shifts to the defendant to articulate a nondiscriminatory reason for treating plaintiff as he did. Once the defendant does that, the plaintiff must bear the burden of proving that he was the victim of intentional discrimination. He can do this by demonstrating that the defendant's proffered reason was a mere pretext and that, as between the plaintiff's age and the defendant's explanation, age was the more likely reason for the dismissal. *Western Electric,* 713 F.2d at 1014; *Lovelace v. Sherwin-Williams Co.,* 681 F.2d 230, 240-41 (4th Cir. 1982).

[1] In a reduction-in-force case, such as we have here, a plaintiff must show four things to make out a *prima facie* case under ADEA: (1) that he is in the protected age group, (2) that he was discharged, (3) that at the time of the discharge, he was performing his job at a level that met his employer's legitimate expectations, and (4) that persons outside the protected age class were retained in the same position or that there was some other evidence that the employer did not treat age neutrally in deciding to dismiss the plaintiff. *Western Electric,* 713 F.2d at 1014-15. An individual must be at least 40 years of age to fall within the protections of ADEA. 29 U.S.C. § 631(a). Herold was.

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3. Title VII of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq.*

[2] Concededly Herold established the first three elements of his *prima facie* case. Hajoca argues, however, that the fourth requirement remained unsatisfied because no younger workers were retained in the same job (*i.e.*, shipping clerk) that Herold held. It is true that the remaining younger workers not discharged when Herold was did not hold jobs with the same title as that assigned to Herold's job and that, on his discharge, his job duties were assigned to a worker older than Herold. But that does not mean that Herold failed to satisfy the fourth element of his *prima facie* case. *Western Electric* provides that a plaintiff can satisfy that element either by showing that persons outside the protected class were retained in the same position or by producing some other evidence indicating that the employer did not treat age neutrally. *Western Electric,* 713 F.2d at 1014-15. Thus, the plaintiff can satisfy the standard by showing that his employer treated an older worker differently than younger employees in similar positions.

[3] The evidence, when viewed in the light most favorable to Herold, would support a jury finding that his employer treated him differently than a number of younger workers who were in similar positions and that Herold thus had made out a *prima facie* case of age discrimination. He presented evidence that he was dismissed while younger workers, at least one of whom was under 40 and therefore outside the ADEA-protected class, were retained. He presented evidence that he was qualified to perform the jobs of those younger workers, including the one under 40. In addition, he presented evidence that the company had a long-standing policy of laying off the workers with the least seniority first whenever faced with an economic downturn, but that the defendant had failed to follow that procedure in the instant case.

Hajoca responded by articulating four facially non-discriminatory reasons for dismissing Herold instead of the younger employees. First it was contended that

Herold's job was the easiest to eliminate. Second, Hajoca contended that company policy did not permit an employee to displace or "bump" a worker with less seniority if the two employees were in different job classifications. Third, Hajoca argued that Herold was less versatile in performing other jobs. Finally, it was argued that Herold was not as good a worker as the others.

Herold then bore the burden of proving that Hajoca's proffered reasons were pretexts. Herold produced evidence that all the jobs in the Staunton, Virginia, branch were virtually interchangeable. He testified that the company policy, if followed, would have allowed him to "bump" workers with less seniority, even if they were in other job classifications.[4] Herold presented evidence that he could perform all jobs but one and could have performed that one if he had received nominal training. Hr presented evidence from his supervisor and coworkers that his job performance had been good. Herold also presented evidence that when faced with cutbacks, the employer laid off an older truck driver while retaining two younger ones in the same job category.

When viewed in the light most favorable to Herold, and when all reasonable inferences are drawn in Herold's favor, the jury could properly have found that Hajoca's proffered reasons for dismissing Herold were mere pretexts and that it was more likely that age was the real reason for his firing.

The evidence at trial presented two versions of what happened and resolution of the case depended on which

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4. Hajoca has argued that the company's "bumping" policy is irrelevant to the case because a mere violation of seniority rights does not give rise to an ADEA action. The argument misses the point. Herold does not claim that he is entitled to relief merely because he was dismissed and less experienced workers retained. He has introduced evidence of the "bumping" policy only to demonstrate that the company deviated from its normal procedure when it came time to apply the policy to a 56-year-old employee.

witnesses were credible. Determining witness credibility is the job of the jury. The district judge was correct in not taking that task away from the jury and in not overturning the verdict of the jurors once they had made a judgment about which witnesses to believe.

Hajoca points to four ADEA cases in which it has been held that no discrimination was proved and argues that those decisions compel the same result in the instant case. However, there are crucial differences between the facts of those cases and the facts of this one. In *Western Electric, supra,* we reversed a finding of discrimination because the trial court misconstrued the law by requiring the plaintiff to prove only the first three, rather than all four, elements of the *prima facie* case. 713 F.2d at 1015. In addition, the *Western Electric* court found that, even if plaintiffs had made out a prima *facie case,* many of the defendant's proffered reasons for demoting the employees had gone unchallenged by the plaintiffs. *Id.* at 1015-16. Likewise, in three other cases relied on by the appellant — *Fink v. Western Electric Co.,*[5] *Lovelace v. Sherwin-Williams Co.,*[6] and *Smith v. Flax,*[7] — the plaintiffs failed to present adequate evidence contradicting most of the defendants' proffered explanations for their personnel decisions. In the instant case, by contrast, Herold presented evidence directly challenging all of the reasons offered by Hajoca to explain its decision to dismiss him.

In sum, the evidence, when viewed in the light most favorable to the plaintiff, would allow the jury to find that the employer treated Herold differently than younger workers and that Herold's age, rather than the reasons proffered by Hajoca, more likely accounted for

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5. 708 F.2d 909 (4th Cir. 1983)
6. 681 F.2d 230 (4th Cir. 1982)
7. 681 F.2d 1062 (4th Cir. 1980)

the dismissal of Herold. Therefore, the trial court properly denied the motions for a directed verdict and a JNOV on the compensatory damages claim.

II.

Turning to Hajoca's motion for a new trial, we should not reverse a denial of a motion for a new trial unless the trial court clearly abused its discretion. *Taylor,* 777 F.2d at 855. Unlike motions for JNOV or directed verdict, a motion for a new trial allows the trial court to weigh the evidence and assess credibility of witnesses. *Id.* at 855. A court may grant a new trial if the verdict was against the clear weight of the evidence, was based upon false evidence or would result in a miscarriage of justice. *Abasiekong v. Shelby,* 744 F.2d 1055, 1059 (4th Cir. 1984).

Hajoca has argued that the trial court erroneously believed that the standard for ruling on motions for a new trial was identical to that for considering a JNOV motion. Because of this, the contention is made that the trial court only considered the evidence favorable to the plaintiff, rather than the entire evidence in ruling on the motion.

As already explained there was sufficient evidence presented to allow the jury to conclude that Hajoca's proferred explanations for dismissing Herold were mere pretexts and that age was the more likely reason for Herold's discharge. The district judge had authority to assess the credibility of witnesses in light of the evidence. Nothing suggests that he abused his discretion when he concluded that the jury verdict should stand.

III.

[4] We must not disturb the trial court's ruling on the relevancy of the statistical evidence offered by Hajoca unless such decision constituted an abuse of discretion. *See Ward v. Johnson,* 690 F.2d 1098, 1113 (4th

Cir. 1982) (*en banc*). The district judge did not abuse his discretion in excluding Hajoca's statistics on relevancy grounds. The district judge agreed to allow Hajoca to present statistical evidence concerning employees who were terminated at the company's Staunton branch for a period 18 months before and 18 months after the dismissal of Herold. The court refused to allow statistical evidence for the company's Mid-Atlantic region as a whole. It was reasonable to conclude that such region-wide statistics would be of limited probative value in determining whether discrimination took place in one particular branch. Furthermore, the court had to take precautions to ensure against juror confusion. Fed.R.Evid. 403. The district judge could reasonably have concluded that the confusion the statistics might cause for the jury would outweigh their probative value. Hajoca also sought to introduce statistical information for the Staunton facility that covered a period beginning as much as three years before the firing of Herold and up to two years after his layoff. Again, the juror confusion over such statistics could outweigh their probative value.

In sum, the district court was well within its discretion. Therefore, there is no reason to consider the appellee's argument that such statistics could only have been presented with the assistance of experts.

IV.

[5] We will not disturb a trial court's award of attorney's fees and costs absent an abuse of discretion. *Cooper v. Dyke,* 814 F.2d 941, 950 (4th Cir. 1987) (attorneys' fees); *Barber v. Kimbrell's, Inc.,* 577 F.2d 216, 226 (4th Cir., *cert. denied,* 439 U.S. 934, 99 S.Ct. 58 L.Ed.2d 330 (1978) (same); *Flint v. Haynes,* 651 F.2d 970, 973 (4th Cir. 1981), *cert. denied,* 454 U.S. 1151, 102 S.Ct. 1018, 71 L.Ed.2d 306 (1982) (costs). This court emphasized in *Barber* that:

> [T]he allowance of attorneys' fees " 'is within the judicial discretion of the trial judge, who has close and intimate knowledge of the efforts expended and the value of the services rendered. . . .' "

577 F.2d at 226 (citations omitted).

Abuse of discretion did not arise in the matter of an award of $47,382.25 in attorney's fees to Herold's lawyers. Hajoca contends that, because of the contingent fee arrangement, there was abuse of discretion because the district court awarded Herold nearly four times as much as Herold was obligated to pay his counsel. Hajoca argues that the amount due counsel under the contingent fee arrangement imposes a ceiling on the amount of the attorney fees the court may award. We have clearly held to the contrary. *Cooper,* 814 F.2d at 951 (attorneys' fees under 42 U.S.C. § 1988),[8] relying on *City of Riverside v. Rivera,* 477 U.S. 561, 576-80, 106 S.Ct. 2686, 2695-97, 91 L.Ed.2d, 466 (1986).

[6] Appellant also argues that paralegal and law clerk time is by definition not encompassed within the term "attorney's fees." Two of our cases have assumed that paralegal and law clerk time was to be included in attorney's fees. *See Lilly v. Harris-Teeter Supermarket,* 842 F.2d 1496, 1510 (4th Cir. 1988) (paralegals); *Yohay v. Alexandria Employees Credit Union, Inc.,* 827 F.2d 967, 974 (4th Cir. 1987) (law clerks). We are similarly inclined.

Apart from the contingent fee and lawyer/paralegal issues, which we have dealt with, Hajoca has failed to point to a single example where the trial court erred in setting the attorney's fees. The district court clearly explained the basis for its decision examining the twelve factors the court has emphasized should be weighed in setting attorney's fees. *See Barber,* 577 F.2d at 225 &

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8. The standard for award of attorneys' fees in age discrimination cases is the same as that applied in § 1988 actions. *Smith v. University of North Carolina,* 632 F.2d 316, 350 (4th Cir. 1980).

n.28. The district court has made a careful examination of each factor and reached a reasonable conclusion. Accordingly, there has been no abuse of discretion.

[7] Next we meet the argument that the district court erred in taxing as costs expenses for deposition transcripts. Hajoca relies on 28 U.S.C. §1920(4), which allows a judge to tax as costs "[f]ees for exemplification and copies of papers necessarily obtained for use in the case." The district court found that the deposition transcript costs fell within §1920(4) because portions of those transcripts were used at trial. The court did not specify how they were used. Hajoca claims that unless the transcripts themselves were introduced into evidence their cost is not taxable to the defendant. The two district court cases Hajoca has relied on do not support such a proposition. *See Sun Pub. Co. v. Mecklenburg News, Inc.*, 594 F.Supp. 1512, 1524 (E.D. Va. 1984); *Wolfe v. Wolfe*, 570 F.Supp. 826, 829 (D.S.C. 1983). Both decisions would permit taxing deposition expenses as costs if those depositions were used for impeachment purposes. When the district judge said that portions of such depositions were used at trial, no doubt he meant that, although they were not actually introduced in evidence, they were used to impeach witnesses.

[8] Finally, Hajoca has argued that attorney travel expenses are not properly taxable as costs. Hajoca reasons that because neither the ADEA nor the Fair Labor Standards Act,[9] 29 U.S.C. §201, *et seq.*, specifically lists travel expenses as recoverable, a prevailing ADEA plaintiff may only recover for those items enumerated in 28 U.S.C. §1920, the general statutory provision governing taxation of costs. To buttress the argument, appellant relies on *Crawford Fitting Co. v. J.T. Gibbons, Inc.*, 482 U.S. 437, 107 S.Ct. 2494, 96

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9. The ADEA incorporates the attorneys' fees provisions of the Fair Labor Standards Act, 29 U.S.C. § 216(b). *See* 29 U.S.C. § 626(b).

L.Ed.2d 385 (1987). Hajoca misunderstands the Supreme Court's decision and Fourth Circuit precedents.

Crawford held that §1920 defines the term "costs" as used in Fed.R.Civ.P. 54(d), which gives trial courts discretion to impose costs on losing parties. *Id.* 107 S.Ct. at 2497. Thus, the Supreme Court reasons, Rule 54(d) does not provide authority to tax as costs those expenses not enumerated in 1920. We have emphasized, however, that, where attorney's fees are expressly authorized by statute (as they are in 29 U.S.C. §216(b)),[10] the trial court is not limited to Rule 54(d), but, in addition, has authority to include litigation expenses as part of a "reasonable attorney's fee." *Wheeler v. Durham City Board of Education,* 585 F.2d 618, 623 (4th Cir. 1978). We have defined such litigation expenses to include "necessary travel." *Id.* Therefore, the trial court did not abuse its discretion in including as costs the travel expenses of the attorneys.

V.

[9] We proceed to consider the propriety of the JNOV overturning the jury's award of liquidated damages. When reviewing a JNOV, an appellate court must view the evidence in the light most favorable to the non-moving party to determine if the jury could properly have found in that party's favor. *Taylor,* 777 F.2d at 854. The ADEA provides that a plaintiff may recover liquidated damages whenever his employer "willfully" violates the Act. 29 U.S.C. §626(b). The jury found a willful violation and assessed liquidated damages against Hajoca. The district judge then granted Hajoca's motion for a JNOV.

The ADEA does not define "willful" but this court has recently provided some guidance in interpreting the term. *See Gilliam v. Armtex, Inc.,* 820 F.2d 1387 (4th

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10. *See* note 9, *supra.*

Cir. 1987). Although *Gilliam* failed to offer an all-inclusive definition of "willful," it upheld a JNOV after a jury finding of willfulness because there was no evidence that "the employer acted in bad faith or with knowledge that its action was so lacking in justification as to warrant a jury's characterization of its conduct as willful." *Id.* at 1390. The Court also cited a Third Circuit case that equated willfulness with outrageousness. *See Dreyer v. Arco Chemical Co.*, 801 F.2d 651 (3d Cir. 1986). We did not, however, explicitly state that we were adopting such a definition. The *Gilliam* court made clear, nevertheless, that mere knowledge that the ADEA prohibited age discrimination and mere failure to obtain legal advice before dismissing an older employee did not constitute willfulness. Otherwise, reasoned the court in *Gilliam*, nearly every ADEA violation would result in liquidated damages. *Gilliam* further suggested that the Fourth Circuit would be hesitant to find willfulness where an economic downturn was a factor in the plaintiff's dismissal. *Id.* at 1390.

In light of *Gilliam*, the district court was correct in granting the motion for a JNOV.[11] Herold's counsel argues that three facts support the jury finding of willfulness: (1) the defendant knew that ADEA prohibited age discrimination; (2) the defendant knew that employees laid off were older than some of the workers retained; and (3) the defendant failed to seek or receive any legal advice or guidelines for complying with ADEA. The arguments do not suffice to validate a liquidated damages award.

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11. Herold's assertion that JNOV is improper because Hajoca failed to object to the jury instructions on willfulness is without merit. The Fourth Circuit decided *Gilliam* between the time of the jury instruction and the granting of the JNOV motion. At the time of trial Hajoca could not be held to anticipate the Fourth Circuit's *Gilliam* decision.

VI.

In conclusion:

A. The district court did not err in denying Hajoca's motions for summary judgment, for a directed verdict and for JNOV.

B. The district court did not abuse its discretion in denying Hajoca's motion for a new trial.

C. The district court did not abuse its discretion in excluding Hajoca's statistical evidence.

D. The district court did not abuse its discretion in awarding attorney's fees and costs to Herold.

E. The district court did not err in entering a JNOV overturning the jury's award of liquidated damages.

In all respects the judgment is
AFFIRMED.

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF VIRGINIA
HARRISONBURG DIVISION

WARREN G. HEROLD	:	CIVIL ACTION
Plaintiff,	:	
v.	:	
HAJOCA CORPORATION	:	
Defendant.	:	NO. 83-0128-H

MEMORANDUM OPINION

MICHAEL, District Judge

This matter comes before the court upon plaintiff's motion for equitable relief and attorneys' fees. Plaintiff's age discrimination claim was tried to a jury on January 6 and 7, 1987. The jury returned a verdict against the defendant Hajoca Corporation awarding plaintiff $40,642.66 in actual damages and an equal amount as liquidated damages based on the jury's finding that the defendant willfully violated the Age Discrimination in Employment Act (ADEA). 29 U.S.C. §626(b). The parties agreed that the remaining claims for relief, including attorneys' fees and costs, would be decided by the court at a later date. The court postponed entering judgment on the jury verdict pending resolution of the present motion and a motion by the defendant for judgment notwithstanding the verdict.

On May 1, 1987, the court heard argument on defendant's motion for judgment notwithstanding the verdict. The court denied the motion and entered an order to that effect on June 12, 1987. On June 25, 1987, the Court of Appeals for the Fourth Circuit issued its

opinion in *Gilliam v. Armtex, Inc.*, 820 F.2d 1387 (4th Cir. 1987), which discusses the showing a plaintiff must make to receive an award of liquidated damages under the ADEA. Before addressing the plaintiff's motion, therefore, the court believes it should reexamine its ruling on the defendant's motion for judgment notwithstanding the verdict in light of the Fourth Circuit's conclusions in *Gilliam*.

Defendant's Motion for Judgment Notwithstanding the Verdict

[1] In *Gilliam*, a jury had returned verdicts for both compensatory and liquidated damages against the employer. The district court judge granted the defendant's motion for judgment notwithstanding the verdict as to the liquidated damages, but denied the motion as to the compensatory damages. On appeal, the Court of Appeals for the Fourth Circuit affirmed the ruling of the district court. The appeals court began its analysis by noting that in providing for liquidated damages for willful violations of the ADEA, Congress had neglected to define the term "willful."

> The omission has led to contentions, such as that advanced substantially by the plaintiff here, that a finding of willfulness is appropriate if the employer knows that there is such a thing as the ADEA protecting older employees and takes an adverse employment action with respect to an older employee because of his age. This is not enough to support the willfulness finding, however.

820 F.2d at 1390. The court went on to conclude that evidence that an employer was aware of the ADEA and failed to seek advice about compliance with its terms does not constitute a sufficient basis for a finding that the employer willfully violated the statute. In the present case, Vernon Garber, who was manager at the Staunton branch where the plaintiff worked, testified that he was

aware of the existence of the ADEA and that the statute prohibited discrimination against workers on account of age. He further testified that he never sought or received any advice from his home office as to how to conduct layoffs without violating the statute. Under *Gilliam*, this evidence is insufficient to justify a finding that the defendant willfully violated the ADEA. As the court of appeals stated, "[T]here must be something more than a retrospective finding by a jury that there was a simple violation of the statute." 820 F.2d at 1390.

Accordingly, the court will vacate its previous order and grant defendant's motion for judgment notwithstanding the verdict as to the judgment for liquidated damages. The court will deny the motion as to the judgment for compensatory damages for the reasons stated at the hearing on May 1, 1987.

Plaintiff's Motion for Equitable Relief and Attorneys' Fees

The parties have stipulated to the facts necessary for the court's disposition of the motion, and have waived oral argument. For the reasons set forth below, the court will grant plaintiff's motion for equitable relief and award $47,382.25 in attorneys' fees and $1,042.42 in costs.

1. Equitable Relief

In addition to the damages awarded by the jury, the plaintiff seeks equitable relief in the form of lost pension benefits. Based on the record adduced at trial, the court concludes that such relief is appropriate. The parties have stipulated that had the plaintiff voluntarily retired on January 7, 1987, the date the verdict was returned, his monthly pension benefit would have been $154.99. Accordingly, the court will order that the plaintiff's monthly pension benefit be increased to $154.99, retroactive to January 7, 1987.

2. Attorneys' Fees

The Age Discrimination in Employment Act (ADEA), at 29 U.S.C. §626(b), incorporates by reference the attorneys' fees and costs provisions of the Fair Labor Standards Act, 29 U.S.C. § 216. In applying these provisions, courts have generally used the analysis used for other civil rights statutes. *See Smith v. Univ. of North Carolina,* 632 F.2d 316, 350 (4th Cir. 1980); *Spagnuolo v. Whirlpool Corp.,* 641 F.2d 1109, 1115 (4th Cir. 1981) (citing *Walston v. School Bd. of Suffolk,* 566 F.2d 1201, 1204-05 (4th Cir. 1977) and approving use of criteria therein for fixing fees in an ADEA case). This analysis, based on factors set forth in *Johnson v. Georgia Highway Express, Inc.,* 488 F.2d 714 (5th Cir. 1974), has been refined as a result of the Supreme Court's decision in *Blum v. Stenson,* 465 U.S. 886, 104 S.Ct. 1541, 79 L.Ed.2d 891 (1984). In *Daly v. Hill,* 790 F.2d 1071, 1078 (4th Cir. 1986), the Court of Appeals for the Fourth Circuit stated:

> Consequently, *Blum* has shifted the timing of the *Johnson* analysis, as it has been applied in this circuit. The proper point at which the *Johnson* factors are to be considered is in determining the reasonable rate and the reasonable hours. A fee based upon reasonable rates and hours is presumed to be fully compensatory without producing a windfall. In "exceptional circumstances," this presumptively fair lodestar figure may be adjusted to account for results obtained and the quality of representation. (Footnote omitted.)

Following *Daly*, this court will use the *Johnson* factors to determine whether the fee claimed by plaintiff's attorneys is based on reasonable rates and reasonable hours.

Attorneys for plaintiff seek compensation for hours and rates as follows:

Attorney	Hours	Rate	Fee
Edward B. Lowry	143.9	$110.00	$15,829.00
Elizabeth P. Coughter	119.5	75.00	8,962.50
Robert W. Jackson	314.4	70.00	22,008.00
Subtotal			$46,799.50
Paralegals	46.2	$ 35.00	$ 1,617.00
Law Clerks	78.4	35.00	2,744.00
Total			$51,160.50

Plaintiff's attorneys have submitted detailed summaries of their time records, as well as an affidavit from a member of the local bar attesting that the rates requested are reasonable and customary rates for local attorneys of like experience, skill, and reputation. The court will consider each of the *Johnson* factors in light of these materials and the record of the case.

[2, 3] As to the time and labor required (factor 1), counsel for plaintiff unquestionably devoted a great deal of both to the case. Some of this time and labor, however, was consumed developing and presenting a disparate impact theory of discrimination, which plaintiff withdrew at a hearing on November 25, 1985. At the court's request, plaintiff's attorneys submitted a memorandum detailing the hours devoted to the disparate impact theory:

Attorney	Hours	Rate	Fee
Edward B. Lowry	21.4	$110.00	$2,354.00
Elizabeth P. Coughter	43.0	75.00	3,225.00
Robert W. Jackson	16.9	70.00	1,183.00
Paralegal	22.7	35.00	794.50
Total			$7,556.50

Because this work was not required for the plaintiff's ultimate victory on a disparate treatment theory,

the court would ordinarily disallow the fees claimed. Here, however, a substantial portion of the fees resulted from preparing and arguing a motion to compel discovery which the court granted. The court therefore will allow one half of the fees claimed for work on the disparate impact claim.

With regard to the second and third *Johnson* factors, the court finds that the questions presented by the case were not novel, but that the case certainly posed difficulties from an evidentiary standpoint and required a high degree of skill to win. Certainly, the skills of Mr. Lowry, an experienced trial attorney, were not wasted on the case.

The amount of time devoted to this case over a four-year period necessarily precluded acceptance of some other cases at the going rate (factor 4). In addition, the attorneys represented plaintiff for this matter only; they do not represent him generally. These two factors weigh in favor of fixing the fee at the attorneys' normal hourly rate. The parties have stipulated that the rates requested are the customary hourly rates for plaintiff's attorneys (factor 5). The affidavit of a local attorney indicates that the rates are reasonable for this area.

[4] Plaintiff's attorneys undertook representation upon a contingent fee agreement (factor 6). Because they would have received no fee at all had plaintiff lost, they seek an upward adjustment of the overall award. Since the award based on the requested hours and rates exceeds the amount counsel could have received under the normal contingent fee arrangement, however, the court will decline to adjust the fee award upward. Counsel obtained the best results possible in the case, and the amount involved was certainly not insubstantial (factor 8). Nevertheless, the court finds that a fee computed on the basis of the hours and rates requested will be fully compensatory.

As to the remaining *Johnson* factors, the experience, reputation and ability of the attorneys (factor 9) is

reflected in their hourly rates. The parties agree that no time limitations were imposed by the client or the circumstances (factor 7) and that the case was not of an undesirable nature (factor 10). An award based on the hours and rates requested by counsel, minus one half the hours spent on the disparate impact claim, is in keeping with awards made in similar cases in this court (factor 12).

Weighing all of these factors, the court finds that the rates requested by plaintiff's attorneys are reasonable. The court will award the following fees based upon the reasonable rates requested and approved by the court and reasonable hours as calculated by the court:

Attorney	Hours	Rate	Fee
Edward B. Lowry	133.2	$110.00	$14,652.00
Elizabeth P. Coughter	93.5	75.00	7,350.00
Robert W. Jackson	305.95	70.00	21,416.50
Subtotal			$43,418.50
Paralegals	34.85	$ 35.00	$ 1,219.75
Law Clerks	78.4	35.00	2,744.00
Total			$47,382.25

[5] In making this determination, the court notes that in the Fourth Circuit, fees for paralegal and law clerk assistance are recoverable as part of an overall award of attorneys' fees and costs. *Payne v. Travenol Laboratories, Inc.* 74 F.R.D. 19, 23 (N.D. Miss. 1976), cited in *Wheeler v. Durham Bd. of Educ.* 585 F.2d 618, 624 (4th Cir. 1978). Having determined the lodestar figure, the court finds no exceptional circumstances which would justify adjusting this figure and concludes that an award of $47,382.25 is fully compensatory without producing a windfall.

Cost and Expenses

[6] Plaintiff's attorneys have requested $1,042.42 in costs and expenses, consisting of the filing fee, witness fees, mileage for attorneys, and fees for deposition

transcripts and a trial transcript. The filing fee and witness fees are taxable as a matter of course in all actions in federal court under 28 U.S.C. §1920. The fee for the trial transcript would likewise be routinely taxed as costs §1920, since the transcript was necessarily obtained to argue against the defendant's motion for judgment notwithstanding the verdict and motion for new trial. The court therefore will award all of these costs.

[7] In civil rights cases, taxable costs are not limited to those listed in §1920. In *Wheeler v. Durham City Bd. of Educ.,* 585 F.2d 618 (4th Cir. 1978), the Court of Appeals for the Fourth Circuit held that the statutory authorization of reasonable attorney's fees in civil rights cases includes litigation expenses. Attorneys' fees awards under the ADEA are specifically limited to prevailing plaintiffs. 29 U.S.C. §216 (b). A prevailing defendant may recover only those costs set forth in 28 U.S.C. §1920. *Hackett v. Stuckey's, Inc.* 670 F.Supp. 172 (W.D. Va. 1987).

[9] In addition to the costs provided for in §1920, plaintiff here has claimed attorneys' mileage and fees for deposition transcripts. The cost of necessary travel is an expense specifically mentioned in *Wheeler,* 585 F.2d at 623. As for the depositions, the court finds that they were reasonably taken in preparation for trial; indeed, portions of the depositions were actually used at trial. The costs of the depositions are certainly recoverable as litigation expenses. *See Marcoin, Inc. v. Williams,* 88 F.R.D. 588, (E.D. Va. 1980).

Defendant argues that the Supreme Court's recent decision in *Crawford Fitting Co. v. J.T. Gibbons,* U.S., 107 S.Ct. 2494, 96 L.Ed.2d 385 (1987) forbids taxing costs which are not listed in 28 U.S.C. §1920. The court disagrees. *Crawford* is specifically limited to the question of reimbursement for fees paid to expert witnesses. The Court of Appeals for the Fourth Circuit previously addressed this question in *Wheeler,* concluding that

such fees were not recoverable. 585 F.2d at 624. Thus, the rule announced in *Crawford* is not a new one in the Fourth Circuit.

For the foregoing reasons, the court will award the full $1,042.42 in costs, along with $47,382.25 in attorney's fees. An appropriate order shall this day issue.

ORDER

For the reasons stated in the accompanying Memorandum Opinion, it is this day

ADJUDGED AND ORDERED

as follows:

1. The Order of this court entered June 12, 1987, shall be, and it hereby is, vacated.

2. Defendant's motion for judgment notwithstanding the verdict shall be, and it hereby is, granted as to the verdict for liquidated damages.

3. Defendant's motion for judgment notwithstanding the verdict shall be, and it hereby is, denied as to the verdict for compensatory damages.

4. Judgment shall be, and it hereby is, entered in favor of plaintiff in the amount of $40,642.66.

5. The defendant shall be, and it hereby is, ordered to increase plaintiff's monthly pension benefit to $154.99, retroactive to January 7, 1987.

6. Plaintiff's counsel shall be, and they hereby are, awarded $47,382.25 in attorney's fees.

7. Plaintiff shall be, and he hereby is, awarded $1,042.42 as costs, to be taxed according to the bill of costs filed by plaintiff on October 13, 1987.

8. This action shall be, and it hereby is, dismissed and stricken from the docket of this court.

Supreme Court, U.S.
FILED
JUN 7 1989
JOSEPH F. SPANIOL, JR.
CLERK

No. 88-1697

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1989

HAJOCA CORPORATION,
Petitioner,

v.

WARREN G. HEROLD,
Respondent.

REPLY BRIEF FOR PETITIONER

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On Petition for Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

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REPLY BRIEF FOR PETITIONER

Respondent, Warren G. Herold ("Herold"), asks the Court to believe that Petitioner, Hajoca Corporation ("Hajoca"), is not asking the Court to review a "fundamental issue of Federal employment discrimination law' " but to review "this ordinary evidentiary dispute." (R.Br. 7). Herold's *a posteriori* argument that because the jury found in favor of Herold there must have been evidence "to support a determination that Herold was the victim of intentional age discrimination" (*Id.*) is an obvious attempt to convert an error of law ripe for determination by the Court into a factual dispute not normally the subject of the Court's beleaguered docket. Hajoca submits that the issue it presents to the Court is not whether "the jury should have reached a different result," (R.Br. 13) but whether the jury should have been permitted to consider the evidence at all. Hajoca

does not ask the Court to weigh the evidence submitted at trial but to determine whether there is any evidence which links Hajoca's reasons for Herold's termination with age discrimination. In other words, Hajoca asks the Court to correct the confused and mistaken understanding of "pretext" as espoused by the court below in order to clarify the meaning of "pretext for discrimination," proof of which must be presented before a court can permit an age discrimination claim to go to a jury under *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973), and *Texas Department of Community Affairs v. Burdine*, 450 U.S. 248 (1981).

The court below found that the evidence at trial "presented two versions of what happened and resolution of the case depended on which witnesses were credible." (Pet. at A-7-8). The court below concluded that "the jury could properly have found that Hajoca's proffered reasons for dismissing Herold were mere pretexts and that it was more likely that age was the real reason for his firing." (Pet. at A-7). Herold also places great emphasis on the purported credibility issues when he argues "[t]he only issue presented for review by this Court depends on no more than an assessment of which witnesses should have been believed." (R.Br. at 13). Both Herold and the court below misapprehend the teaching of *Burdine*.

As previously stated by this Court, after a *prima facie* case is established, and after the employer articulates nondiscriminatory reasons for the employment decision, the plaintiff retains the burden of proving "that the proffered reason was not the true reason for the employment decision." *Burdine*, 450 U.S. at 256. In other words, the plaintiff must prove the reasons were not the "true reasons, but were a pretext for discrimination." Id. at 253 (citing *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 804 (1973)).

Herold and the court below confuse "credibility" with *Burdine's* "unworthy of credence" language. *Burdine's* "unworthy of credence" standard is another way of stating the fundamental causation requirement in all employment discrimination cases. Unless an employer's action is caused by a statutorily prohibited motivation, the reasons for the action are not subject to jury scrutiny because no prohibited action has occurred. The court below does not require proof of causation but merely subjective disagreement with an objectively truthful explanation for a business decision.

Merely offering evidence which disagrees with some of an employer's reasons for its decision does not prove, as required by *Burdine*, that those reasons were not the true reasons for the decision, and most certainly does not prove that those reasons were a cover-up for discrimination.[1] If the reasoning of the court below is allowed to stand, any employee who disagrees with his employer's reasons for discharge can have his fate decided by a jury under the guise of a credibility determination without one shred of evidence that either the employer did not believe those reasons, or that the reasons were a cover-up for discrimination.

Hajoca readily admits that this case, as Herold claims, is distinguishable from *Brieck v. Harbison-Walker Refractories*, No. 86-3068 (3d Cir. June 19, 1987), *cert. granted*, 108 S.Ct. 1218 (1988), *cert. withdrawn*, 57 U.S.L.W. 4063 (December 12, 1988); however, this case is distinguishable for reasons not cited by Herold. In *Brieck*, the denial of summary judgment by the Third Circuit Court of Appeals was challenged on the grounds stated in Herold's brief at page 11, n.4.

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1. The evidence offered by Herold on the issue of pretext clearly is not the type of evidence recognized by the Court in *McDonnell Douglas* and *U.S. Postal Service Board of Governors v. Aikens*, 460 U.S. 711 (1983) as relevant evidence of pretext for discrimination. *See* Pet. at 9-10.

However, subsequent proceedings before the Court revealed that the dispute centered on the weight to be given evidence on a summary judgment motion, not whether, as in this case, a jury should be permitted to consider an employer's business judgment without any direct or indirect evidence that the judgment was motivated by an intent to discriminate.[2] This case poses the precise question considered important by the Court in *Brieck*.

Finally, Herold's claim that Hajoca misstates the opinion of the court below is unsupported by any reference to the record. In fact, the court below cavalierly distinguished this case from *Lovelace v. Sherwin-Williams Co.*, 681 F.2d 230 (4th Cir.1982), a decision which Herold quotes, on the grounds that Herold, unlike the plaintiff in *Lovelace*, "presented evidence directly challenging all of the reasons offered by Hajoca." (Pet. at A-8). Had the court below properly followed the *Lovelace* decision, the court below would have granted judgment in favor of Hajoca.

The issue of causation in employment discrimination cases has been addressed innumerable times by the circuit courts of appeal. The principles of *McDonnell Douglas* and *Burdine* appear straightforward, yet, as Hajoca's Petition shows, have been applied in starkly contrasting ways. *See Price Waterhouse v. Hopkins*, 57 U.S.L.W. 4469 (U.S. May 1, 1989) (Kennedy, J. dissenting, "Lower courts long have had difficulty applying *McDonnell Douglas* and *Burdine*." 57 U.S.L.W. at 4486). That the court below incorrectly applied these principles is clear. That a conflict among the circuit

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2. Of course, the question posed to the Court in this case involves consideration of the evidence presented in the Court below. To that extent, the question is fact-bound. However, the principle of law involved is fundamental — can a jury in an employment discrimination case consider an employer's business judgment without any evidence that the judgment was motivated by discriminatory animus?

courts exists is also clear. For these reasons, a writ of certiorari should issue.

Respectfully submitted,

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Dated: June 7, 1989